2002

Pacificorp. dba Utah Power, an Oregon Corporation v. Fox Ridge Planned Communities, LLC, a Utah limited liability company; and Does I through X, inclusive, : Brief of Appellant

Utah Court of Appeals

Paul C. Drecksel; Stephen J. Hill; James L. Ahlstrom; Parr, Waddoups, Brown Gee & Loveless; Counsel for Appellant.
Anthony L. Rampton; Jones, Waldo, Holbrook & McDonough; Counsel for Appellee.

IN THE UTAH COURT OF APPEALS

PACIFICORP, dba UTAH POWER,
an Oregon corporation,

Plaintiff and Appellee,

vs.

FOX RIDGE PLANNED COMMUNITIES, LLC,
a Utah limited liability company;
and DOES I through X, inclusive,

Defendant and Appellant.

APPELLANT BRIEF OF FOX RIDGE PLANNED COMMUNITIES, LLC

Case No. 20020902-CA

(*Oral Argument and Published Disposition Requested*)

Appeal from Ruling of Judge Ray Harding, Jr.,
Fourth Judicial District Court in and for Utah County, Utah

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LIST OF PARTIES

1. **Pacificorp**, dba Utah Power, an Oregon corporation – plaintiff/**appellee**.

2. **Fox Ridge Planned Communities, LLC**, a Utah limited liability company – defendant/**appellant**.

3. Tractus, LLC, a Utah limited liability company – co-counterclaimant with Fox Ridge and non-party to this appeal.

4. The Redevelopment Agency of Lehi City, a government entity, third party defendant and non-party to this appeal.

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I. JURISDICTION

The Utah Supreme Court has original appellate jurisdiction in this matter pursuant to Utah Code Ann. § 78-2-2(3)(j) and Rule 4 of the Utah Rules of Appellate Procedure. The Supreme Court referred jurisdiction to the Court of Appeals pursuant to Utah Code Ann. § 78-2-2 (4).

II. ISSUES FOR REVIEW AND STANDARD OF REVIEW

A. Did Judge Harding err in granting PacifiCorp's motion for summary judgment? The courts review the rulings on motions for summary judgment for correctness. *Boud v. SDNCO*, 2002 UT 83, ¶ 10, 54 P.3d 1131 (Utah 2002); *Harline v. Baker*, 912 P.2d 433, 438 (Utah 1996); *Schurtz v. BMW North America, Inc.*, 814 P.2d 1108, 1112 (Utah 1991). Fox Ridge preserved this issue with the timely filing of its Notice of Appeal. Tr. 1003.

B. Did Judge Harding err in denying Fox Ridge's motion for summary judgment? As indicated above, rulings on motions for summary judgment are reviewed for correctness. Fox Ridge preserved this issue with the timely filing of its Notice of Appeal. Tr. 1003.

C. Did Judge Harding err in making the following evidentiary rulings: (1) refusing to admit or consider parol evidence; and (2) granting PacifiCorp's motions to strike? The determination of the admissibility of evidence, including the admissibility of parol evidence, is a question of law that is reviewed for correctness. *Spears v. Warr,* 2002 UT 24, ¶ 18, 44 P.3d 742 (Utah 2002); *Wadsworth Contr. v. City of St. George,* 898 P.2d 1372, 1378 (Utah 1995). Fox

Ridge preserved these issues by timely filing its Notice of Appeal, Tr. 1003, by its proffers of evidence, Tr.187-189, 191-195, 592-594, 602-603, 624-626, 889-891, 949-951, 953-955, and by its memorandum in opposition to PacifiCorp's first motion to strike. Tr. 967. PacifiCorp filed its second motion to strike on March 7, 2001, the day before the hearing on the motions for summary judgment, leaving Fox Ridge no opportunity to respond in writing. Tr. 946-948. It did so without filing a motion that the motion be heard in shortened time. Nonetheless, without notice to Fox Ridge, Judge Harding heard the motion the following day and granted it in his written ruling. Tr. 977, 981-988.

D. Did Judge Harding err in denying Fox Ridge's conditional Rule 56(f) motion for continuance? The grant of this motion would have precluded summary judgment, and therefore should be reviewed for correctness. Fox Ridge preserved this issue by timely filing its Notice of Appeal. Tr. 1003.

III. DETERMINATIVE AUTHORITIES

The interpretation of the following rules is determinative of this appeal:

A. Rule 56, Utah Rules of Civil Procedure.

B. Rules 401, 402, 408, 803 and 804, Utah Rules of Evidence.

These rules are set forth in their entirety as Tab 13 of the Addendum to this brief. There are no constitutional provisions, statutes, ordinances or regulations whose interpretation is determinative of this appeal.

IV. STATEMENT OF THE CASE

A. *Nature of the Case.* PacifiCorp filed this action on January 16, 2001, seeking a declaratory judgment that it possesses the right under a Transmission Line Easement over Fox Ridge's real property to remove existing two pole and three pole structures and install in their place much larger steel towers. Tr. 19. On February 5, 2001, Fox Ridge filed a counterclaim seeking a declaratory judgment that PacifiCorp does not possess that right, and also seeking injunctive relief. Tr. 62-112. (PacifiCorp's and Fox Ridge's claims regarding interpretation of the transmission line easement are collectively referred to as the "Easement Claims" or separately as PacifiCorp's "Easement Claim" and Fox Ridge's "Easement Claim," respectively.)

Fox Ridge's counterclaim also made claims that PacifiCorp's plan to construct, own and operate new power transmission lines over Fox Ridge's property violated the Lehi City Redevelopment Agency's (the "RDA") Alpine Highway Redevelopment Plan (the "Redevelopment Plan") and the Utah Neighborhood Redevelopment Act; that the RDA adopted the Redevelopment Plan without adequate notice and hearing in violation of Fox Ridge's due process rights; that PacifiCorp's proposed ownership of a new transmission line and other facilities across Fox Ridge's property would constitute an unconstitutional use of public funds in violation of the Utah Constitution, Article XI, § 5, Article XIV, § 3, and Utah Code Ann. §§ 10-8-2 and 17-50-302 and –303; that PacifiCorp's construction of steel towers and a new transmission line would constitute an

unlawful condemnation of Fox Ridge's property; and that PacifiCorp had a duty under a Franchise Agreement with Lehi City to provide electrical power to Fox Ridge (the "RDA Claims"). Fox Ridge sought declaratory and injunctive relief in connection with these claims. Tr. 62-112.

B. *Course of Proceedings.* On January 29, 2002, before Fox Ridge even had the opportunity to answer PacifiCorp's complaint, PacifiCorp filed a motion for summary judgment. Tr. 25-26. On January 31, 2002, Judge Raymond M. Harding, Jr., held a telephone scheduling conference, and, at PacifiCorp's request[1], established an accelerated briefing and hearing schedule. Tr. 676-677. Judge Harding's Scheduling Order provided, among other things: (1) that Fox Ridge must file its answer and any counterclaims by February 5, 2001; (2) that Fox Ridge must file its response to the pending summary judgment motion and file any summary judgment of its own no later than February 15, 2001; and (3) that the Court would hear oral argument on "the parties' respective motions for summary judgment" on March 8, 2001. Tr. 676-677.

As ordered, Fox Ridge filed its answer and counterclaim on February 5, 2001, Tr.112; filed a response to PacifiCorp's motion for summary judgment on the Easement Claims and a cross motion for summary judgment on the Easement Claims on February 15, 2001, Tr. 144, 661; and also filed a motion for summary judgment on the RDA Claims on February 15, 2001. Tr.136, 591.

[1] PacifiCorp filed a motion for speedy hearing, together with its motion for summary judgment. Tr. 59.

The parties subsequently filed a series of motions on evidence and procedure. On February 15, 2001, Fox Ridge filed a conditional motion for continuance of PacifiCorp's motion for summary judgment under Rule 56(f). Tr. 152. Even though the Court's Scheduling Order provided that the parties' respective summary judgment motions would be heard on March 8, 2002, PacifiCorp filed a motion on February 21, 2001, asking the Court to bifurcate the issues to be heard at the March 8 hearing, *i.e.*, to proceed as scheduled on the parties' motions for summary judgment on the Easement Claims and to stay the briefing schedule and hearing on Fox Ridge's motion for summary judgment on its RDA Claims. Tr. 664. On February 27, 2001, PacifiCorp filed a motion to strike certain evidence Fox Ridge offered in support of its motion for summary judgment on the Easement Claims and in opposition to PacifiCorp's motion for summary judgment. Tr. 757, 786. On March 6, 2001, PacifiCorp filed its own conditional motion for continuance of Fox Ridge's motion for summary judgment on the Easement Claims under Rule 56(f). Tr. 920. Finally, on March 7, 2001 – the day before the scheduled hearing – PacifiCorp filed a motion to strike the Affidavit of S. Kenly Clark that Fox Ridge filed on March 1, 2001, together with its reply memorandum in support of its cross motion for summary judgment on its Easement Claims. Tr. 948.

Due to the expedited schedule, during the January 31 scheduling conference PacifiCorp agreed to produce documents per informal written request by Fox Ridge on an expedited basis no later than February 9. Tr. 167, 171. On February

9, PacifiCorp produced a number of additional documents, but never fully complied with Fox Ridge's requests. Tr. 160, 796. Neither party took any depositions.

Without ruling on whether it would grant PacifiCorp's motion to bifurcate (and thereby deny Fox Ridge a hearing on its motion for summary judgment on the RDA Claims), or without giving notice that it would hear PacifiCorp's motions to strike, Judge Harding proceeded with the scheduled hearing on March 8, 2001[2]. At the outset of the hearing, Judge Harding announced he would not hear Fox Ridge's motion for summary judgment on the RDA Claims because Fox Ridge had not served the Lehi City Redevelopment Agency, and in so doing effectively granted PacifiCorp's motion to bifurcate. He then heard argument on all remaining motions, including PacifiCorp's motions to strike that were neither noticed nor fully briefed, and took the matter under advisement. Tr. 977. He issued his written ruling on March 12, 2001. Tr. 988 (Tab 2 of Addendum).

Disposition Below. Even though the parties urged opposite interpretations of the subject easement, Judge Harding concluded that "[b]oth parties agree that the easement language is clear and unambiguous, and the Court so holds." Tr. 987 (Tab 2 of Addendum). Having so held, Judge Harding found the matter ripe for summary judgment and ruled as follows:

[2] The Court's Notice of Hearing on Motion for Summary Judgment, Tr. 61, was the only notice given of any motion to be heard on March 8, 2001.

1. Granted PacifiCorp's motion for summary judgment on its Easement Claim.

2. Denied Fox Ridge's motion for summary judgment on its Easement Claim.

3. Granted PacifiCorp's motions to strike.

4. Denied PacifiCorp's motion to bifurcate as moot.

5. Denied Fox Ridge's Rule 56(f) motion as moot.

6. Announced that Fox Ridge's motion for summary judgment requires additional parties and was not yet properly before the Court.

Tr. 981 (Tab 2 of Addendum).

On April 15, 2002, Judge Anthony Schofield entered an Order to Show Cause under Rule 4(b) of the Utah Rules of Civil Procedure, and Rule 4-103 of the Utah Code of Judicial Administration, requiring the parties to appear and show cause why the case should not be dismissed for failure to prosecute. Tr. 997. The parties appeared as ordered and Judge Schofield continued the matter until August 23, 2002. Tr. 998. Without further notice, Judge Schofield entered an Order of Dismissal without prejudice of all remaining claims on September 24, 2002. Tr. 1000.

Fox Ridge timely filed its Notice of Appeal on October 23, 2002. Tr. 1003.

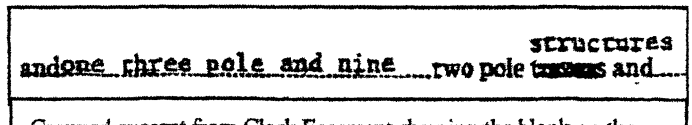
Statement of Facts. Fox Ridge is the owner and developer of approximately 2600 acres of real property in northern Utah County known as the Traverse Mountain Master Planned Community ("Traverse Mountain"). Tr. 656.

Once completed, Traverse Mountain will include 3500 homes, office space, retail shops, restaurants, theatres, parks, schools, churches, hospitals, police and fire departments, nature trails and a 1,200 acre nature preserve. Tr. 655.

On December 21, 1956, Sylvan W. Clark and Zella R. Clark, Fox Ridge's predecessors in interest, granted Utah Power & Light ("UP&L"), PacifiCorp's predecessor in interest, the subject easement and right of way (the "Clark Easement") across the Traverse Mountain property. Tr. 622 (Tab 6, Exhibit A of Addendum), 657. The Clark Easement is set out on UP&L's pre-printed form entitled Transmission Line Easement, and grants to UP&L:

> a perpetual easement and right of way for the erection and continued maintenance, repair, alteration, inspection, relocation and replacement of the electric transmission, distribution, telephone and telegraph circuits of the Grantee, one *three pole and nine* two pole ~~towers~~ **structures** and four guy anchors with the necessary guys, stubs, cross arms, braces and other attachments affixed thereto, for the support of said circuits, on, under, over through, and across [the relevant property]. (Emphasis added.)

As shown by the enlarged excerpt of the crucial words contained in the Clark Easement, the words in italics ("one three pole and nine") were typed into blanks on the form. The word "towers" was x-d out. The word in bold ("structures") was inserted above the x-d out word. Tr. 622 (Tab 6, Exhibit A of Addendum), 657. The Clarks intended that striking the word "towers" would exclude large steel towers and limit UP&L (and successors) to



Cropped excerpt from Clark Easement showing the blank on the easement form filled in and the word "towers" x'd out with the typewriter.

erecting wooden poles of the size UP&L actually installed. Tr. 890 (Tab 7 of Addendum).

In 1957, UP&L constructed a transmission line to connect its substation on 90th South in Salt Lake County to the Hale substation at the mouth of Provo Canyon (the "90th South-Hale Line"), and, as provided in the Clark Easement, erected one three pole and nine two pole structures over the Traverse Mountain property. Tr. 656-657.

In 1956 and 1957, contemporaneous with the execution of the Clark Easement, UP&L obtained easements from property owners all along the 90th South-Hale Line on the same pre-printed form as the Clark Easement that provided for the erection of a specific number of two pole and three pole structures. Tr. 648-650. Examples include:

- Johnson Easement: "no structures" and "no guy anchors" (Tab 6, Exhibit B of Addendum)
- Southworth Easement: "one 3-pole structure" and "6 guy anchors" (Tab 6, Exhibit C of Addendum)
- Beck Easement: "one 3-pole structure, 14 two pole structures" and "4 guy anchors" (Tab 6, Exhibit D of Addendum)
- Broadbent Easement: "two two pole structures" and "no guy anchors" (Tab 6, Exhibit E of Addendum)
- Burgess Easement: "no two pole towers" and "no guy anchors" (Tab 6, Exhibit F of Addendum)

- Hansen Lime Easement: "one three pole structure, 2 two-pole structures"and "6 guy anchors" (Tab 6, Exhibit G of Addendum)

In each easement, except the Burgess Easement, the word "towers" is x'd out. Tr. 609 (Tab 6, Exhibit G of Addendum), 611 (Tab 6, Exhibit F), 613 (Tab 6, Exhibit E), 615 (Tab 6, Exhibit D), 617 (Tab 6, Exhibit C) and 619 (Tab 6, Exhibit B). The number and type of pole structures described in each of these easements corresponded to the type and number of pole structures UP&L intended to install. Tr. 718-719.

UP&L subsequently obtained other electrical transmission line easements that, although similar in most respects to the Clark Easement, contained significantly broader language. For example, on October 10, 1978, Security Title Company and others conveyed a power line easement to UP&L permitting the "erection ... of electric transmission and distribution circuits ..., with the necessary *poles, towers, guys*, stubs, crossarms, braces and other attachments affixed thereto ..." Tr. 606 (Tab 6, Exhibit H of Addendum), 648 (emphasis added). On or about June 29, 1989, Michael M. Carlson conveyed an easement to UP&L granting "a perpetual easement and right of way for the erection, operation, maintenance, repair, alteration, *enlargement,* inspection, relocation and replacement of electric transmission and distribution lines ..." Tr. 603 (Tab 6, Exhibit I of Addendum), 648.

PacifiCorp also has rewritten at least one of the original easements along the 90th South-Hale Line to broaden its language and expand the type of

permissible structures. On May 29, 1996, PacifiCorp obtained from Micron, successor to the real property covered by the original Beck Easement described above, a modified easement granting:

> a perpetual easement and right of way for the erection, operation, maintenance, repair, alteration, *enlargement,* inspection, relocation and replacement of electric transmission and distribution lines, communications circuits, fiber optic cables and associated facilities, and four – three pole structures, six – two pole structures, *one – four pole switch structure* and fourteen guy anchors, with the necessary stubs, crossarms, braces and other attachments affixed thereto, for the support of said lines and circuits ...

Tr. 600 (emphasis added) (Tab 6, Exhibit J of Addendum). Notably, all of the above evidence was obtained without the benefit of full discovery prior to issuance of Judge Harding's summary judgment ruling; other additional relevant evidence most assuredly exists that Fox Ridge was not able to distill (see section VI.D, *infra*).

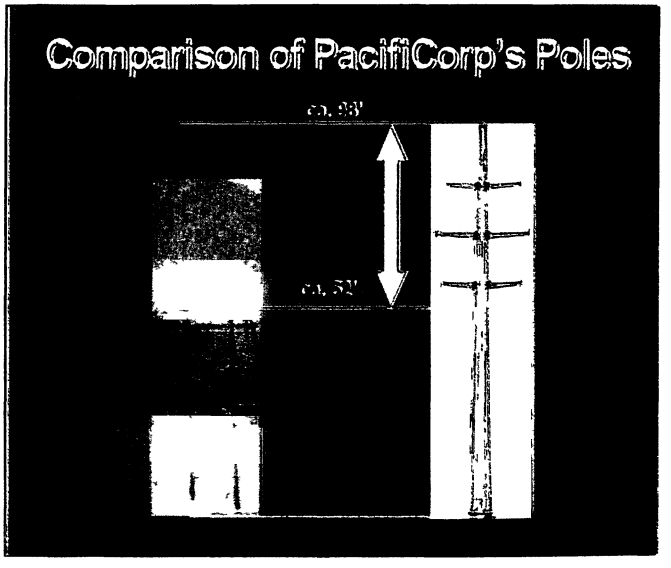
In about June of 2000 – 43 years after UP&L erected the original two pole and three pole structures on Fox Ridge's property – representatives of PacifiCorp, including PacifiCorp's lawyer, Jeff Richards, met with Stephen Christensen, Fox Ridge's Operations Manager, and requested that Fox Ridge sign a new easement that would relocate a portion of the transmission lines across Traverse Mountain and replace the original Clark Easement over the balance of the easement corridor (the "Unsigned 2000 Fox Ridge Easement"). Tr. 646, 950 (Tab 9 of Addendum). The Unsigned 2000 Fox Ridge Easement identified Utah Valley Land Company as "Grantor" (as PacifiCorp apparently was unaware Fox Ridge had purchased the

property), Tr. 594 (Tab 6, Exhibit K of Addendum), and contained significantly broader language than the Clark Easement, stating:

> [Grantor] hereby grants to PacifiCorp, ... ("Grantee"), an easement for a right of way 50 feet in width, more or less for the construction, reconstruction, operation, maintenance, repair, replacement, *enlargement*, and removal of electric power transmission, distribution and communication lines *and all necessary and desirable accessories and appurtenances thereto, including without limitation: supporting towers, poles, props, guys and anchors* .... (Emphasis added).

Tr. 594 (Tab 6, Exhibit K of Addendum), 646.

During the meeting, PacifiCorp's representatives advised Mr. Christensen that PacifiCorp intended to remove the existing two pole and three pole structures and install in their place the much larger single pole steel towers that are the subject of this litigation, and to add an additional transmission line. Tr. 950 (Tab 9 of Addendum). Fox Ridge ultimately refused to sign the 2000 Fox Ridge Easement, and informed PacifiCorp that the proposed construction of new steel towers and an additional transmission line exceeded the express scope of the Clark Easement. Tr. 544-546 (Tab 5 of Addendum), 652.



The original two and three pole structures averaged 52 feet in height and 16

inches in diameter. Tr. 625 (Tab 6 of Addendum), 653. In contrast, the steel towers average 89 feet in height, Tr. 703, and are larger in diameter than the two and three pole structures, with at least one such tower measuring approximately 6 feet in diameter. Tr. 625 (Tab 6 of Addendum), 653.

Due to their increased height and girth, the new towers increase the burden on the Traverse Mountain property in at least the following respects:

1. They require setbacks of 400 to 600 feet on either side of the transmission line, well beyond the 50-foot corridor provided for in the Clark Easement. Tr. 187-189 (Tab 3 of Addendum), 192-195 (Tab 4 of Addendum), 652.

2. They will cause the loss or devaluation of 500 to 800 residential lots. Tr. 192-195 (Tab 4 of Addendum), 651.

V. SUMMARY OF ARGUMENTS

A. Under Utah law, a contract is ambiguous if it is capable of more than one reasonable interpretation. *R & R Enters. v. Mother Earth Indus., Inc.*, 936 P.2d 1068, 1074 (Utah 1997) (ambiguity exists if contract language is "reasonably capable of being understood in more than one sense"); *Ward v. Intermountain Farmers Ass'n*, 907 P.2d 264, 269 (Utah 1995). It follows that if Fox Ridge's interpretation of the Clark Easement is reasonable, then Judge Harding erred in granting PacifiCorp's motion for summary judgment.

The most reasonable interpretation of the Clark Easement is that the parties intended the words "two pole and three pole structures" to refer to the particular

type of structures that PacifiCorp actually erected on the Traverse Mountain property; and that the words "alteration," "relocation," and "replacement" give PacifiCorp the right to alter the original two and three pole structures, to relocate them, and to replace them with similar structures, but not to remove the original structures and install steel towers, which are much larger and therefore more intrusive, in their place.

One indication that the foregoing interpretation is reasonable is that the parties struck the word "towers" and replaced it with the word "structures," manifesting their intention that the easement exclude tall steel towers and permit only two and three pole structures of the type actually erected. A further indication of the reasonableness of this interpretation is that the 50-foot right of way is insufficient for PacifiCorp's steel towers. For safety and other reasons, setbacks of at least 100 feet are necessary on both sides of the towers.

In short, Fox Ridge's interpretation that the parties who created the Clark Easement intended the words "two pole and three pole structures" to refer to the type of structures actually erected, and did not intend the words "alteration," "relocation," and "replacement" to allow PacifiCorp to substitute the more intrusive steel towers for the original structures, is reasonable. Accordingly, the Court should reverse Judge Harding's order granting summary judgment in favor of PacifiCorp.

B. Judge Harding should have granted Fox Ridge's motion for summary judgment because PacifiCorp's interpretation of the language of the

Clark Easement is not reasonable. PacifiCorp's position is that the easement cannot be read to impose any limitation on the type of permissible structure. If that were so, the easement would not have specified two pole and three pole structures but would have simply granted UP&L the right to erect ten structures of any type as needed to support the electrical transmission lines.

Alternatively, if both Fox Ridge's and PacifiCorp's interpretations are reasonable and the easement is therefore ambiguous, Judge Harding should have granted summary judgment in favor of Fox Ridge because the undisputed extrinsic evidence resolves the ambiguity in Fox Ridge's favor. As shown below, the extrinsic evidence shows that the parties intended to limit permitted structures to the type actually erected. That evidence includes the following:

1. Original transmission line easements along the 90th-South Hale Line granting UP&L the right to erect a specific number of two pole and three pole structures. These easements, consistent with the Clark Easement, indicate an intent that the UP&L be limited to a certain number *and type* of structures.

2. Subsequent UP&L and PacifiCorp transmission line easements containing broader language than that included in the Clark Easement, in particular providing for "enlargement" of permitted structures, and allowing generally for "towers" or other structures rather than specifying two pole and three pole structures.

3. A modification of the Beck Easement – one of the original 90th South-Hale Line easements – to allow "enlargement" of supporting structures, and

also to add one "four pole structure" to the type of structures permitted in the easement corridor. This indicates that UP&L's successor, PacifiCorp, understood the original 90th South-Hale Line easements did not permit "enlargement" of permitted structures, and that changing the type of structures to be erected in the easement required amendment of the easement language.

4. PacifiCorp's proposed substitute for the original Clark Easement that added the word "enlargement" and replaced the words "two pole and three pole structures" with the words "all necessary and desirable accessories and appurtenances thereto, including without limitation: supporting towers, poles, props, guys and anchors ..." This again demonstrates that PacifiCorp knew how to draft broad language of grant and knew, too, that the narrower words "two pole and three pole structures" contained in the Clark Easement limited the type of structures that could be erected in a way that prevented erection of steel towers.

5. The Affidavit of S. Kenly Carlson, the son of the grantors, stating that his parents struck the word towers to keep UP&L from putting anything larger than the original wooden poles on the subject property.

6. The Affidavits of James Christensen and Rustin Tolbert stating that the proposed steel towers would significantly increase the burden on the servient estate because, among other things, the towers would require much greater setbacks than the original two and three pole structures – setbacks significantly exceeding the 50 foot right of way provided for in the Clark Easement – and would eliminate or devalue 500 to 800 lots.

C. Judge Harding erred in granting PacifiCorp's motions to strike the Carlson Easement, the Unsigned 2000 Fox Ridge Easement, portions of the Affidavits of James Christensen and Rustin Tolbert, and the Affidavit of S. Kenly Carlson because:

1. The Carlson Easement, although not pertaining to the 90th South-Hale Line easement corridor, provides for "enlargement" of permitted structures and thereby demonstrates the type of language PacifiCorp itself considered necessary to permit the enlargement of such structures.

2. The Unsigned 2000 Fox Ridge Easement was not an offer of compromise, as Judge Harding ruled. Rather, PacifiCorp offered that easement as part of a proposed business transaction before there was any dispute between the parties.

3. Contrary to Judge Harding's ruling, the Christensen and Tolbert Affidavits were not speculative but based on the personal knowledge of the affiants as to the setbacks required for large power transmission towers and the impact of the towers on the number of lots that could be developed on the Traverse Mountain property.

4. The Kenley Clark Affidavit, although hearsay, presents direct evidence of intent not available elsewhere. It contains sufficient circumstantial indications of reliability in that Mr. Clark is a disinterested witness and has specific memory of the circumstances surrounding the execution of the Clark Easement because he ran the family cattle business on the subject property at the

time the easement was executed and was concerned about its impact on that business.

D. At a minimum, Judge Harding erred in denying Fox Ridge's Rule 56(f) motion. Given the compressed schedule and PacifiCorp's failure to timely produce documents as requested, he should have continued the hearing on PacifiCorp's motion to allow discovery of evidence on meaning of the words "two pole and three pole structures" and "towers." He also should have permitted discovery on the issue of burden, particularly as to the type of setbacks reasonably required for steel towers nearly 100 feet in tall.

VI. ARGUMENT

A. Judge Harding Erred in Granting Pacificorp's Motion for Summary Judgment.

1. Relevant Legal Standards.

Rule 56(c) of the Utah Rules of Civil Procedure allows a court to enter summary judgment only if the court finds "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party bears the burden of proof that there is no genuine issue of as to any material fact. *Jensen v. IHC Hospitals, Inc.*, 944 P.2d 327, 339 (Utah 1997). For purposes of a summary judgment motion, all "facts and reasonable inferences drawn therefrom [must be viewed] in the light most favorable to the nonmoving party." *Walker Drug Co. v. La Sal Oil Co.*, 902 P.2d 1229, 1230 (Utah 1995). "A trial court may properly grant a motion for summary judgment ... only when

reasonable minds could not differ on the facts to be determined from the evidence presented." *Olympus Hills Shopping Center v. Smith's Food & Drug Centers, Inc.*, 889 P.2d 445, 450 (Utah App. 1995).

In the instant case, the parties filed cross motions for summary judgment. Each party claimed the Clark Easement clearly and unambiguously supported its interpretation. Judge Harding erroneously concluded that, because both parties contended the easement was unambiguous, the matter was ripe for summary judgment and extrinsic evidence irrelevant. However, "the filing of cross-motions for summary judgment does not necessarily mean that material issues of fact do not exist." *Plateau Mining Company v. Utah Division of State Lands and Forestry*, 802 P.2d 720, 725 (Utah 1990). "Rather, cross-motions may be viewed as involving a contention by each movant that no genuine issue of facts exists under the theory it advances, but not as a concession that no dispute remains under the theory advanced by its adversary." *Wycalis v. Guardian Title of Utah,* 780 P.2d 821, 825 (Utah App. 1989).

When interpreting a contract, the basic rule is that the intent of the parties must be ascertained from the instrument itself. *Plateau Mining,* 802 P.2d at 725. Parol evidence may be admitted to explain the parties' intent if a contract is ambiguous. *Id.*; *Ward v. Intermountain Farmers Ass'n*, 907 P.2d 264, 268 (Utah 1995). "When determining whether a contract is ambiguous, any relevant evidence *must* be considered. ... A judge should ... consider any credible evidence offered to show the parties' intention." *Id.* (emphasis added). "[I]f a legal

conclusion is reached that an ambiguity exists in the contract and there is a factual issue as to what the parties intended," summary judgment may not be granted. *Plateau Mining,* 802 P.2d at 725.

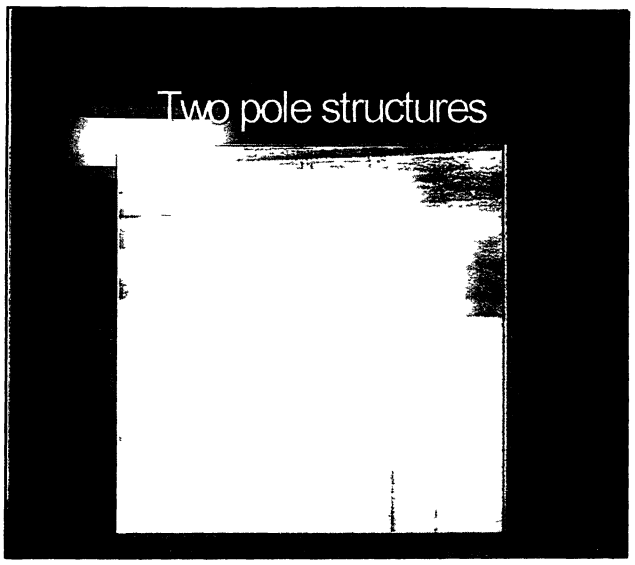
In interpreting an easement, "[t]he accepted rule is that the language of the grant is the measure and extent of the right created; and that the easement should be so construed as to burden the servient estate only to the degree necessary to satisfy the purpose described in the grant." *Weggeland v. Ujifusa*, 384 P.2d 590, 591 (Utah 1963).

2. Fox Ridge's Interpretation that the Parties Intended the Words "Two Pole and Three Pole Structures" to Refer to the Type of Structures UP&L Actually Erected is Reasonable.

As shown above, a contract that is capable of more than one reasonable interpretation is ambiguous as a matter of law. *Ward v. Intermountain Farmers Ass'n*, 907 P.2d at 269. It follows that if Fox Ridge's interpretation is reasonable, then Judge Harding erred in granting summary judgment in favor of PacifiCorp. *Lucky Seven Rodeo Corp. v. Clark*, 755 P.2d 750, 752-53 (Utah Ct. App. 1988) (reversing trial court's grant of summary judgment based on alleged unambiguous language because the easement language, especially the term "maintenance," did not unambiguously reflect the intent of the parties).

The most reasonable interpretation of the easement is that the parties intended that UP&L would have the right to erect two and three pole structures of the type it actually built. Indeed, all along the 90th South-Hale Line, from Lehi

to Highland to Provo, stands a pattern of assembled, framed wooden structures, consisting of two or three wooden poles with wooden cross members. The picture at right shows such structures. Under the doctrine of practical construction of a contract, the fact that UP&L actually erected wooden two and three pole structures on the Traverse Mountain property demonstrates UP&L's understanding that these are the type of structures the Clark Easement permitted. *Upland Indus. Corp. v. Pacific Gamble Robinson Co.*, 684 P.2d 638, 642 (Utah 1984) ("[A] practical construction placed by the parties upon the instrument is the best evidence of their intention." (quoting *Rosen v. E.C. Losch Co.*, 44 Cal. Rptr. 377, 381 (Cal. Ct. App. 1965)); *Zeese v. Estate of Max Siegel*, 534 P.2d 85, 90 (Utah 1975) ("Under the doctrine of practical construction, when a contract is ambiguous and the parties place their own construction on their agreement and so perform, the court may consider this as persuasive evidence of what their true intention was. The parties, by their action and performance, have demonstrated what was their meaning and intent.")



PacifiCorp concedes that in 1956 and 1957, contemporaneous with the execution of the Clark Easement, UP&L obtained easements from property owners for a power line between its substation at 90th South and its Hale substation at the mouth of Provo Canyon. As PacifiCorp explains:

> These easements were form documents, each containing the same language, with blanks to be filled in only for the number of support structures that UP&L then intended to erect on each particular parcel of property. Some parcels were small, and required an easement solely for the power lines themselves to cross over the air space of the surface of the property; no support structures were to be built on these properties. Other parcels were larger, and required an easement not only for the airspace for the lines themselves, but also required the erection of a number of support structures. In these cases, the parties filled in the number of structures then intended to be installed.

Tr. 718-719. Recorded easements all along the 90th South-Hale Line, to the extent they allow supporting structures at all, use the words "two pole structures" and "three pole structures." As does the Clark Easement, these easements also specify the number of guy wires that may be installed to support the structures. Tr. 609 (Tab 6, Exhibit G of Addendum), 611 (Tab 6, Exhibit F of Addendum), 613 (Tab 6, Exhibit E of Addendum), 615 (Tab 6, Exhibit D of Addendum), 617 (Tab 6, Exhibit C of Addendum) and 619 (Tab 6, Exhibit B of Addendum). PacifiCorp omits to mention that these easements specified the particular type, as well as the number, of structures to be installed on the various properties. Such specificity is inconsistent with any interpretation other than that the parties intended to limit the type, as well as the number, of structures that UP&L could erect on each of the subject properties.

As is evident from the plain language of the Clark Easement, the parties intended (1) that UP&L would have a perpetual easement and right of way for electric transmission lines or "circuits" and (2) that the burden of the easement be minimized by limiting UP&L to a particular number and type of support

structures. In granting PacifiCorp's summary judgment motion, Judge Harding gave effect to the former of these intentions but nullified the latter. In contrast, Fox Ridge's interpretation gives full effect to all of the Clark Easement's terms and thus full effect to the parties' intentions. *Dixon v. Pro Image Inc.*, 987 P.2d 48, 52 (Utah 1999) ("[A] court must attempt to construe the contract so as to 'harmonize and give effect to all of [its] provisions.'" (quoting *Nielson v. O'Reilly*, 848 P.2d 664, 665 (Utah 1993)). In short, Fox Ridge reasonably interprets the words "two and three pole structures" to limit the type of permissible structures. Accordingly, Judge Harding's order granting summary judgment in favor of PacifiCorp must be reversed.

3. The Parties' Striking of the Word "Towers" Provides Further Indication that Fox Ridge's Interpretation is Reasonable.

As stated above, the Clark Easement is set forth on UP&L's pre-printed form. The parties struck the printed word "towers" and replaced it with the word "structures." In interpreting a contract, the fact finder may consider such alterations to a printed form. *Schow v. Guardtone, Inc.*, 417 P.2d 643, 645-46 (Utah 1966) (finding "most important" factor in interpretation of assignment contract the fact of alterations made to a printed form).

PacifiCorp contends, and Judge Harding agreed, that the word "structures" is broader than, and inclusive of, the word "towers," and that the parties actually expanded the easement by replacing the word "towers" with the word "structures." Tr. 718. But this argument mischaracterizes the real issue, which is whether at the

time of executing the Clark Easement the parties understood and intended the words "two pole and three pole structures" to refer to the particular type of structures that were different from "towers." In other words, the issue is whether the parties understood the words "two and three pole structures" and "towers" to be terms of art describing a particular (and different) type of support structures. The answer, of course, is yes. Plainly the limiting words "two pole and three pole" indicate a particular type of structure. If the parties intended the word "structures" to be used in its broadest sense it would have stood alone without the modifying words "two pole and three pole."

Judge Harding denied Fox Ridge the opportunity to take evidence on this issue, but Fox Ridge believes discovery would show that in the 1950s UP&L and other power companies used the combination of words "two pole", "three pole", and "structures" to refer to the type of wooden pole structures it actually erected along the 90th South-Hale Line, and the word "towers" (which was x'd out of the Clark Easement) to refer to larger steel towers. Certainly there is, at a minimum, sufficient indication that this is so and therefore it was error for Judge Harding to grant summary judgment for PacifiCorp.

4. The Words "Alteration," "Relocation," and "Replacement" only Give PacifiCorp the Right to Alter the Existing Structures, to Relocate Them, and to Replace Them with Similar Structures.

PacifiCorp argues, and Judge Harding agreed, that the words "alteration," "relocation," and "replacement" permit the removal of the two and three pole structures and erection of steel towers in their place. But the most reasonable

interpretation of these words is that they permit nothing more than the alteration of the original two and three pole structures, the relocation of those original structures, and the replacement of those original structures with similar structures.

The dictionary defines the word "alteration" as "... the state of being altered: *The alteration improved the dress."* The Random House Dictionary of the English Language, at 43 (Unabridged Ed., 1967). Synonyms of alteration are "modification" and "adjustment." To make an "alteration" of a will means to modify some language, not create a new will. To alter a dress or a suit means to take it in, or let it out, not manufacture a new and different dress or suit. To make an alteration of a thing means to modify a thing, not replace it with something new and different. Thus "alteration" of "two and three pole structures" means to modify those very structures, not replace them with something entirely different such as, for example, PacifiCorp's much larger steel towers.

The word "replacement" means, in common usage, "to provide a substitute or equivalent in the place of": "to replace a broken vase or dish." The Random House Dictionary of the English Language, at 1216 (Unabridged Ed., 1967). Thus a "repair or replace warranty" gives a purchaser the right to demand replacement of a defective article with an article with the same or a substantially similar article. It does not give the purchaser the right to demand a different article that performs a similar function. If, for example, a careless hunter were to shoot out an insulator on one of PacifiCorp's poles, the Clark Easement would allow PacifiCorp to replace it. Similarly, if a pole were to rot or to be blown down in a windstorm,

PacifiCorp would have the right to replace the defective pole with a similar pole. But replace, in its common meaning, cannot be read to mean that PacifiCorp would have the right to remove the existing two and three pole structures and erect something different in their place.

Finally, the word "relocate" means PacifiCorp has the right to change the location of the permitted two and three pole structures. That word cannot be read to grant the right to substitute steel towers for two and three pole structures.

In short, contrary to PacifiCorp's argument and Judge Harding's ruling, the plain meanings of the words "alteration," "replacement" and "relocation" do not permit substitution of steel towers for two and three pole structures. Those words only permit the alteration of the existing two and three pole structures, the replacement of two and three pole structures with similar structures, and the relocation of the existing (or replacement) two and three pole structures. They do not grant PacifiCorp to erect something significantly larger and more intrusive.

5. The Most Reasonable Interpretation of the Clark Easement is that PacifiCorp's Towers Exceed the Scope and Extent of the Easement Grant, and Impose a Substantial Additional Burden on the Servient Estate.

Utah law regarding the scope and extent of easements is well-established:

> The accepted rule is that the language of the grant is the measure of the extent of the right created; and that the easement conveyed should be so construed as to burden the servient estate only to the degree necessary to satisfy the purpose described in the grant.

Weggeland v. Ujufusa, 384 P.2d at 591. "A right of way founded on a deed or grant is limited to the uses and extent fixed by the instrument." *Labrum v.*

Rickenbach, 711 P.2d 225, 227 (Utah 1985). It is impermissible for a court to expand the terms of the easement beyond those set out in the grant. *Id.*

As stated above, the Clark Easement language evidences the parties' intent that UP&L have a perpetual easement and right of way for transmission lines. The easement language also evidences that the parties intended to limit the burden on the servient estate by specifying the precise number *and type* of permitted support structures.

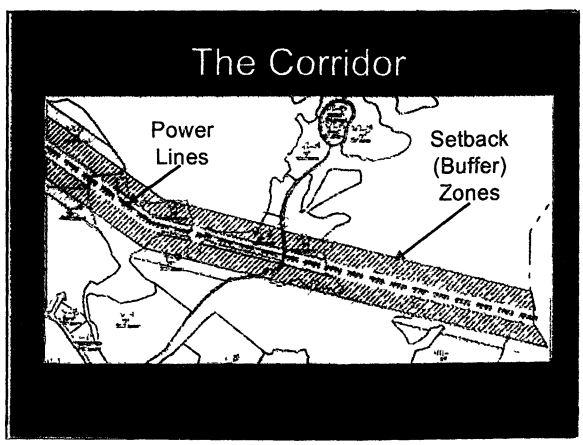
A further indication that the parties intended to limit the burden to the servient estate is that the Clark Easement provides for only a 50-foot right-of-way for the pole structures and transmission lines. As PacifiCorp admits, its new towers range from 79 to 98 feet and average approximately 89 feet in height. Tr. 729. The effect of this increase in height is to significantly widen the corridor required for the towers beyond that provided for in the original easement grant.

Fox Ridge offered unrebutted evidence that the increased height of the towers requires a corridor wider than 50 feet. For example, Fox Ridge offered the Affidavit of Rustin J. Tolbert of D.R. Horton, one of the nation's largest homebuilders and one of the developers selected by Fox Ridge to develop the property in question, in which Mr. Tolbert stated that, due to the increased height of the towers and a new 150 megawatt circuit, D.R. Horton would require setbacks of at least 400 feet (and up to 600 feet) on either side of the towers.[3] Fox Ridge

[3] As Fox Ridge argues below, Judge Harding erroneously granted PacifiCorp's motion to strike the Affidavit of Rustin J. Tolbert that presented evidence of the need for such setbacks.

Reply at 13. FHA requires a minimum setback at least equal to the height of power transmission towers (which it refers to as the "fall distance") on dwellings covered by FHA mortgages. HUD Handbook, 4150.2 (as provided by FHA) (Tab 11 of Addendum). Prince William County, Virginia, requires a setback of two feet from a dwelling for every foot in height of a tower supporting power transmission lines. Internet at www.co.prince-william.va.us/coatty/code/32-240.htm (Tab 12 of Addendum). Red Oak, Texas, requires that residential dwellings must be set back an additional foot for every foot by which a neighboring transmission line or tower exceeds 15 feet. Bolton and Sick, "Power Lines and Property Values: The Good, the Bad and the Ugly," The Urban Lawyer, The National Quarterly on State and Local Government Law, Vol. 31, No. 2 (Spring 1999) (Tab 10 of Addendum). All of these authorities point to the same conclusion – 50 feet is an insufficient corridor for towers nearly 100 feet tall. Under the minimum Red Oak standard, a corridor of approximately 160 feet is necessary, and under the more conservative D.R. Horton view an 800-foot corridor is required.

The reason for setbacks is obvious. Winds can blow towers down, and power lines can fall. Courts have held that fear of cancer alone (cancerphobia) – no matter how unreasonable – is a sufficient basis for an award of damages caused by a power line easement.



Criscuola v. Power Authority of the State of New York, 602 N.Y. Supp. 2d. 588 (N.Y. 1993); *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895 (Fla. 1987).

As matter of safety, there must be a wide corridor on either side of power transmission lines and towers. The taller the towers, the greater the setback required. By any standard, even a common sense standard, a 50-foot wide right of way is an insufficient corridor for nearly 100-feet tall towers carrying a double circuit for 150 megawatts of electricity.

PacifiCorp has argued that Fox Ridge is attempting to diminish PacifiCorp's rights through its own changed use of the property. Tr. 713. Nothing could be further from the truth. The Clark Easement plainly restricts PacifiCorp to a certain number and type of structures to be contained within a 50-foot right of way. The burden of the easement may not extend beyond that contemplated under the original grant. By increasing the height of the towers, it is PacifiCorp that is restricting Fox Ridge's use of its land outside the easement corridor. It is not PacifiCorp, but Fox Ridge, that owns the servient estate in fee simple. To the extent PacifiCorp's changed use denies Fox Ridge the benefit of its real property outside the easement corridor, it is PacifiCorp that has exceeded its rights and expanded the burden of the easement. *See* 25 AM. JUR. 2D *Easements* § 81 (1996) ("The owner of an easement is said to have all rights incident or necessary to its proper enjoyment, *but nothing more . . . . If the easement owner exceeds his rights . . . he becomes a trespasser. . . .*") (emphasis added). Thus, to the extent the

heightened towers require a wider corridor than that provided for in the Clark Easement grant, PacifiCorp impermissibly adds to the burden of the easement.

As stated above, PacifiCorp in effect argued, and Judge Harding erroneously ruled, that UP&L's permanent right of way for transmission lines nullifies the equally clear language intended to limit the burden those lines would impose. It is not reasonable to conclude that the same parties who went to such care to describe the number and type of permitted structures, and to specify a maximum corridor width, intended no limitation on the height or girth of the structures that might be installed. The most reasonable interpretation is that the parties intended to limit permitted structures to two and three pole structures of the type UP&L installed.

6. Because Fox Ridge's Interpretation is Reasonable, Judge Harding's Summary Judgment Order Must Be Reversed.

Judge Harding relied on cases from other jurisdictions in which courts ruled for various reasons that certain power transmission easements permitted the replacement of wooden H-frame structures with larger structures. *Florida Power Corp. v. Silver Lake Homeowners Assoc.,* 727 So. 2d 1149 (Fla. App. 1999); *Central Power and Light Co. v. Holloway*, 431 S.W. 2d 436, 440 (Tex. Civ. App. 1968); *Talty v. Commonwealth Edison Co.*, 347 N.E.2d 74 (Ill. App. 1976). Not one of those decisions is controlling here, and not one of them interprets the language at issue here. Those decisions are either inapposite because the language

of grant at issue in those cases is broader than that of the Clark Easement, or they are simply wrong.

As stated in another case cited by Judge Harding, "the general rule [is that] 'when precise language is employed to create an easement, such terminology governs the extent of usage.'" *Preseault v. United States,* 100 F.3d 1525, 1542 (Fed. Cir. 1996). Thus, this Court is bound to decide this case based solely on the language of the Clark Easement. Fox Ridge reasonably interprets that language to limit the number and type of permitted support structures. Because Fox Ridge's interpretation is reasonable, Judge Harding's summary judgment order is incorrect and must be reversed.

B. Judge Harding Erred in Denying Fox Ridge's Motion for Summary Judgment.

1. Because PacifiCorp's Interpretation is Unreasonable and Because Extrinsic Evidence Supports Fox Ridge's Reasonable Interpretation, Judge Harding's Order Denying Summary Judgment in Favor of Fox Ridge Should be Reversed.

As discussed above, a contract that is capable of more than one reasonable interpretation is ambiguous. It follows that if Fox Ridge's interpretation of the Clark Easement is reasonable, and PacifiCorp's is not, then the easement is unambiguous and summary judgment must be granted in favor of Fox Ridge. On the other hand, if both parties' interpretations are reasonable, and the Clark Easement is therefore ambiguous, the Court may consider extrinsic evidence to resolve the ambiguity. *Ward v. Intermountain Farmers Ass'n,* 907 P.2d at 269. Based on both the unreasonableness of PacifiCorp's interpretation, and Fox

Ridge's undisputed extrinsic evidence, Judge Harding's order denying Fox Ridge's cross motion for summary judgment should be reversed.

With but one immaterial exception, PacifiCorp failed to offer any affidavits or other evidence controverting Fox Ridge's statement of undisputed facts in support of its summary judgment motion. PacifiCorp either admitted Fox Ridge's facts to be true, argued that they are immaterial, or stated without evidentiary support that it disputes those facts. Rule 56(e) of the Utah Rules of Civil Procedure provides in relevant part that:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Thus Rule 56(e) requires that, to the extent Fox Ridge's evidence is material and otherwise admissible, it must be taken as true. PacifiCorp's unsupported allegations and denials cannot create an issue for trial.

Hence, if the Court finds the Clark Easement to be ambiguous, because PacifiCorp did not offer any evidence to refute Fox Ridge's extrinsic evidence, it may rely only on Fox Ridge's evidence in resolving the ambiguity and must enter summary judgment for Fox Ridge based on that evidence.[4] Similarly, because PacifiCorp did not offer any evidence to rebut Fox Ridge's evidence of burden on

[4] The Court may also consider extrinsic evidence to determine whether ambiguity exists. "When determining whether a contract is ambiguous, any relevant evidence *must* be considered. ... A judge should ... consider any credible evidence offered to show the parties' intention." *Ward v. Intermountain Farmers Ass'n*, 907 P.2d 264, 268 (Utah 1995) (emphasis added).

the servient estate, the Court may rely on that evidence to determine whether PacifiCorp's evidence created a burden exceeding that permitted under the easement grant.

2. PacifiCorp's Interpretation of the Clark Easement is Unreasonable.

PacifiCorp contends that the Clark Easement "cannot by any stretch be construed to limit the parties in terms of the specific *type* of support structure that could be erected there." Tr. 718. In order to accept PacifiCorp's interpretation, the Court would have to find that the words "one three pole and nine two pole structures" allow PacifiCorp to erect "ten structures" of any size or material. But UP&L, which drafted the easement, chose not to use broad or general language that clearly would have supported this interpretation, which it could easily have done. Rather than do so, UP&L specified a particular type of structure – two pole and three pole structures – and even designated the number of guy anchors permitted within the easement corridor. That specific language is inconsistent with PacifiCorp's expansive interpretation, which attempts to ignore or "read out" the easement language stating the particular type of structures that would be allowed. PacifiCorp's unreasonably broad interpretation conflicts with the fundamental principle that each contract provision is to be considered in relation to all of the others, with a view toward giving effect to all and ignoring none. *Plateau Mining*, 802 P.2d at 725.

PacifiCorp's broad interpretations of the words "alteration," "relocation," and "replacement" are likewise unreasonable. Under PacifiCorp's interpretation

of the word "alteration," men's suit vendor Mr. Mac's free lifetime alterations policy would have driven him to bankruptcy; he would have been required to provide new suits to customers who found their old suits no longer fit. Similarly, under the PacifiCorp view, a "replacement" warranty on a Toyota Corolla would entitle the owner of a defective Corolla to a new Land Cruiser. And "relocation" of an object would mean replacement of the object with a new and different object. Those interpretations are clearly contrary to the plain meaning of the words in question, and are therefore unreasonable.

Because PacifiCorp's interpretation of the Clark Easement language is unreasonable, Judge Harding's order denying Fox Ridge's cross motion for summary judgment should be reversed.

3. PacifiCorp's Conduct Establishes that the Clark Easement Does Not Permit the Erection of Steel Towers.

If the Court were to find PacifiCorp's broad interpretation of the easement to be reasonable (which it should not) it may, as shown above, consider extrinsic evidence to resolve the ambiguity. In resolving ambiguous contract language, the Court may consider conduct of the parties, including subsequent acts, indicating the meaning the parties themselves gave the contract language. *See Upland Indus.*, 684 P.2d at 642 ("[A] practical construction placed by the parties upon the instrument is the best evidence of their intention." (quoting *Rosen*, 44 Cal. Rptr. at 381); *Zeese*, 534 P.2d at 90 ("Under the doctrine of practical construction, when a contract is ambiguous and the parties place their own construction on their

agreement and so perform, the court may consider this as persuasive evidence of what their true intention was. The parties, by their action and performance, have demonstrated what was their meaning and intent.")

Both contemporaneous with, and subsequent to, the execution of the Clark Easement, PacifiCorp (and its predecessor UP&L) engaged in a variety of conduct indicating their understanding that the Clark Easement allows only two and three pole structures of the type actually erected and excludes steel towers. This conduct includes the following:

a. Following the execution of the Clark Easement, UP&L erected one wooden three pole and nine wooden two pole structures on the subject property, the very structures that stood until PacifiCorp filed the instant lawsuit. The fact that UP&L built the type of structures described in the easement is the best evidence of what the parties intended by the language of the easement. Tr. 656-657.

b. At about the time the Clark Easement was executed, other landowners along the 90th South-Hale Line also executed easements specifying "two pole and three pole structures." Tr. 609 (Tab 6, Exhibit G of Addendum), 611 (Tab 6, Exhibit F of Addendum), 613 (Tab 6, Exhibit E of Addendum), 615 (Tab 6, Exhibit D of Addendum), 617 (Tab 6, Exhibit C of Addendum) and 619 (Tab 6, Exhibit B of Addendum). UP&L erected the same type of structures pursuant to those easements as it did under the Clark Easement, further indicating

that the words two pole and three pole structures indicated a particular type of structure. Tr. 718-719.

c. PacifiCorp subsequently obtained transmission line easements containing broader and more expansive language regarding the type of permitted structures than did the Clark Easement. For example, on June 29, 1989, Michael M. Carlson executed an easement conveying to UP&L the following:

> A perpetual easement and right of way for the erection, operation, maintenance, repair, alternation, *enlargement*, inspection, relocation and replacement of electric transmission and distribution lines, communications circuits, fiber optic cables and associated facilities, one steel pole and one guy anchor, with the necessary guys, stubs, crossarms, braces and other attachments affixed thereto, for the support of said lines and circuits.

Tr. 603, 648. Although this easement was not on the 90th South-Hale Line, it provides evidence that UP&L understood that the grant language needed to include the word "enlargement" for it to have the right to enlarge supporting structures.

Similarly, on May 29, 1996, Micron executed an easement modifying an earlier transmission line easement across its property on the 90th South-Hale Line immediately east of Fox Ridge's property (the "Modified Beck Easement"). This modified easement continues to specify two pole and three pole structures, but adds language providing for "enlargement" of supporting structures and "one four pole switch structure," specifically granting to PacifiCorp:

> a perpetual easement and right of way for the erection, operation, maintenance, repair, alteration, *enlargement*, inspection, relocation and replacement of electric transmission and distribution lines, communications, circuits, fiber optic cables and associated facilities,

> and four – three pole structures, six – two pole structures, *one four pole switch structure* and fourteen guy anchors, with the necessary stubs, crossarms, braces, and other attachments affixed thereto, for the support of said lines and circuits ...

Tr. 600 (Tab 6, Exhibit J of Addendum). This Modified Beck Easement is evidence that PacifiCorp both understood that language specifying particular a type of structures actually limited the type of structures it had the right to build, and that the word "enlargement" is needed for it to have the right to enlarge existing structures.

d. In about June of 2000, PacifiCorp proposed that Fox Ridge sign an easement providing:

> [Grantor] hereby grants to PacifiCorp, ... ("Grantee"), an easement for a right of way 50 feet in width, more or less for the construction, reconstruction, operation, maintenance, repair, replacement, *enlargement*, and removal of electric power transmission, distribution and communication lines *and all necessary and desirable accessories and appurtenances thereto, including without limitation: supporting towers, poles, props, guys and anchors ....* (Emphasis added).

Tr. 646. Here again PacifiCorp included language providing for "enlargement" of supporting structures. PacifiCorp also included broad language regarding the type of permitted supporting structures ("all necessary and desirable accessories and appurtenances thereto, including without limitation ... supporting towers ..."), indicating it viewed the narrow language of the Clark Easement as inadequate to permit erection of towers in place of two and three pole structures.

In sum, the Clark Easement and other contemporary easements limited the type of structures permitted on the 90th South-Hale Line. Later, more expansive

easements permitted "enlargement" and, at least in the case of the 2000 Fox Ridge Easement, included general language regarding the type of structures permitted in the easement corridor. The contrast between the earlier specific language and later more general language shows that the parties intended the Clark Easement to allow only the two and three pole structures specified to exclude large towers.

4. The Affidavit of S. Kenly Clark Shows that the Parties Intended to Limit the Type of Structures that Could Be Erected in the Easement Corridor and to Exclude Steel Towers.

The best evidence of the Clarks' intentions in striking the word "towers" would be the testimony of the Clarks themselves, but they are both deceased. Shortly before the hearing on the parties' summary judgment motions, however, Fox Ridge located the Clarks' son, S. Kenly Clark, whose testimony is the next best thing. Mr. Clark was 21 at the time his parents signed the easement, and paid close attention to their negotiations with UP&L because the power line affected the cattle business he ran on the property. He discussed the easement with his parents many times. He recalls that his parents struck the word "towers" from the easement form because they did not want anything larger or taller than the original wooden poles on the property. He recalls his father telling him anything larger than the wooden poles would wreck the view and hurt the value of the property. Tr. 890-891 (Tab 7 of Addendum).

5. Both the Easement Language and Extrinsic Evidence Require Summary Judgment in Favor of Fox Ridge.

As shown above, PacifiCorp's interpretation of the Clark Easement is

unreasonable. Moreover, even if it were reasonable and the easement were therefore ambiguous, extrinsic evidence – including UP&L's and PacifiCorp's contemporaneous and subsequent conduct, and the affidavit of S. Kenly Clark, the grantors' surviving son – supports the conclusion that the parties intended the Clark Easement to limit the type of structures that could be erected on the Traverse Mountain property to the two and three pole structures actually erected. Fox Ridge's burden evidence presented in section VI.A.5 above requires the same conclusion.[5] Both the unreasonableness of PacifiCorp's interpretation and extrinsic evidence require reversal of Judge Harding's order denying summary judgment in favor of Fox Ridge.

C. Judge Harding Erred in Granting Pacificorp's Motions to Strike.

1. Judge Harding Should Have Admitted the 2000 Fox Ridge Easement.

Judge Harding excluded the Unsigned 2000 Fox Ridge Easement based on Rule 408 of the Utah Rules of Evidence, which provides in relevant part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

[5] Of course, Judge Harding excluded much of the extrinsic evidence Fox Ridge offered, and it may be considered only if admissible. As shown below, Judge Harding erred in excluding this evidence.

PacifiCorp has the burden of proving that the Unsigned 2000 Fox Ridge Easement should be excluded under this rule. *See Davidson v. Prince,* 813 P.2d 1225, 1232 (Utah App. 1991), *cert denied,* 826 P.2d 651 (Utah 1991). Judge Harding erred in finding PacifiCorp met this burden.

Rule 408 applies only if the evidence in question is part of a "compromise negotiation." *Davidson,* 813 P.2d at 1232. A document may not be considered part of a compromise negotiation unless there is an actual dispute and an attempt to resolve that dispute. *Walsh v. First Union Life Ins. Co.*, 982 F. Supp. 929, 931 (W.D.N.Y. 1997); *Kraemer v. Franklin and Marshall College*, 909 F. Supp. 267, 268 (E.D. Pa. 1995).

PacifiCorp moved to strike the Unsigned 2000 Fox Ridge Easement based solely on the conclusory Affidavit of R. Jeff Richards, which states in relevant part the following:

> In June 2000, in an attempt to settle this matter short of litigation, PacifiCorp entered into negotiations with Fox Ridge. As part of the negotiation, PacifiCorp attempted to resolve this matter by simply negotiating a new and differently-worded easement over Fox Ridge's property. In connection with these negotiations, PacifiCorp asked Fox Ridge whether it would be willing to sign the so-called "Unsigned Fox Ridge Easement," which is attached to Fox Ridge's memorandum in support of its cross-motion as Exhibit K.

Tr. 789. Judge Harding accepted this conclusory affidavit at face value in ruling in PacifiCorp's favor. In so doing, he completely ignored the contradictory Affidavit of Stephen L. Christensen, which sheds considerably more light on the

circumstances under which PacifiCorp presented the Unsigned 2000 Fox Ridge Easement. Tr. 949-51 (Tab 9 of Addendum).

Mr. Christensen states that in approximately June 2000, a representative of PacifiCorp called and asked to meet at his office. Mr. Christensen subsequently met with representatives of PacifiCorp, including PacifiCorp's attorney, Jeff Richards. At the meeting PacifiCorp's representatives explained to Mr. Christensen that they wanted to relocate a portion of the power line over Fox Ridge's property and construct a new line in place of the existing wooden poles, handing him computer-enhanced photographs they said showed the difference between the new steel towers and the existing wooden poles. They then handed him a three-page document consisting of the Unsigned 2000 Fox Ridge Easement and a map of the power line easement. Mr. Christensen told PacifiCorp's representatives he had to go back to his office and think about it. Tr. 949-51 (Tab 9 of Addendum).

The Richards Affidavit is insufficient to meet PacifiCorp's burden of establishing the parties had entered into compromise negotiations, particularly in light of the Christensen Affidavit. As the Christensen Affidavit shows, and the Richard Affidavit fails to disclose, PacifiCorp offered the Unsigned 2000 Fox Ridge Easement during a meeting in which PacifiCorp *for the first time* explained its intent to replace the existing wooden pole structures with steel towers and asked that Fox Ridge sign the proposed new easement. PacifiCorp offered the Unsigned 2000 Easement as part of a proposed business transaction when there

was no dispute between the parties. It was only when Fox Ridge said no to PacifiCorp's proposal that a dispute arose. Rather than being part of compromise negotiations, PacifiCorp's offer of the Unsigned 2000 Fox Ridge Easement was part of the conduct that created the dispute that precipitated the instant litigation. If the Unsigned 2000 Fox Ridge Easement is not admissible, then the evidence of dispute required for a declaratory judgment action does not exist.

It is as if PacifiCorp, after years of driving over an old road past a house, showed up one day, announced to the homeowner it now needed to drive over the homeowner's lawn, and demanded that the homeowner sign a document giving PacifiCorp the right to do so. This is a demand that creates a dispute, not an offer of compromise to resolve it.

Moreover, the 2000 Fox Ridge Easement language itself belies Mr. Richards' affidavit testimony that the parties had entered into a negotiation. That language names Utah Valley Land Company as grantor, not Fox Ridge. Tr. 594 (Tab 6, Exhibit K of Addendum). Had there been any prior discussion or negotiation, PacifiCorp would have known that Utah Valley Land Company had conveyed the property to Fox Ridge. Again, PacifiCorp's proposed Unsigned 2000 Fox Ridge Easement is not the product of any attempt to compromise or settle a disputed claim. PacifiCorp proposed it during an introductory meeting between businessmen to explore the possibility of "striking a deal," not to settle any dispute, and therefore Rule 408 has no application. *See Walsh*, 982 F. Supp. at 931 (refusing to exclude letters because, at the time they were sent, "neither a

dispute, nor a clear difference of opinion, existed"; and because the discussions were really "business communications" not within the scope of Rule 408).

Hence, because the Unsigned 2000 Fox Ridge Easement was not part of an offer of compromise falling under Rule 408, Judge Harding erred in refusing to admit it.

2. Judge Harding Should Have Admitted Evidence of the Additional Burden PacfiCorp's Towers Impose on the Servient Estate.

Judge Harding excluded as speculative both Rustin Tolbert's affidavit testimony of setbacks that reputable homebuilders require from power lines, and James Christensen's affidavit testimony of the negative impact the steel towers would have on the Traverse Mountain development. This testimony is hardly speculative. Mr. Tolbert states in his affidavit that his employer is D.R. Horton, one of the largest homebuilders in the United States. He is not speculating about the setbacks from steel towers that D.R. Horton requires; he knows that for a fact from his experience at D.R. Horton. Tr. 188 (Tab 3 of Addendum).

Similarly, James Christensen is a partner in Fox Ridge, the developer of the Traverse Mountain property. He does not speculate when he says PacifiCorp's towers will cause certain building lots to be lost; he knows this because the additional setback from PacifiCorp's steel towers and power lines would require Fox Ridge to eliminate lots planned for in the original design of the subdivision. Tr. 191-95 (Tab 4 of Addendum), 953-55 (Tab 8 of Addendum).

3. Judge Harding Should Have Admitted the Carlson Easement.

Judge Harding excluded the Carlson Easement as irrelevant because it was granted thirty years after the easement in question and on unrelated land. Subsequent acts of the parties are admissible to resolve or even show ambiguity. *See Ward v. Intermountain Farmers Ass'n*, 907 P.2d at 268; *Upland Indus.*, 684 P.2d at 642; *Zeese*, 534 P.2d at 90. The language of grant of the Carlson Easement is similar to that of the Clark Easement, except for the addition of the word "enlargement." The inclusion of that word is suggestive of what UP&L considered necessary in order to have the right to enlarge the size of supporting structures. For that reason, it is relevant to the interpretation of the Clark Easement under Rules 401 and 402 of the Utah Rules of Evidence.

4. Judge Harding Should Have Admitted the Affidavit of S. Kenly Clark.

Judge Harding excluded the affidavit of S. Kenly Clark as a clear violation of the hearsay rule. Mr. Clark's affidavit makes hearsay statements concerning his parents' intentions regarding the overstrike of the word "towers" relative to the type of structures permitted in the easement corridor.

Rules 803(24) and 804(b)(5) allow the admission of hearsay not falling into a specific exception to the hearsay rule, whether or not the declarant is unavailable, where there are "circumstantial guarantees of trustworthiness" and the court determines that "(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any

other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."

Mr. Clark's affidavit testimony is evidence of a material fact, namely, his parents' intentions relative to easement language describing the structures permitted in the easement corridor. Since both of Mr. Clark's parents are deceased and no UP&L witnesses could be located, Mr. Clark's hearsay testimony is the best available evidence of the parties' intentions. Given the passage of time and the resulting unavailability of witnesses, the interests of justice are best served by the admission of testimony from the one person who could be located having a memory of the subject transaction.

Despite the passage of time, there are two strong circumstantial indications that Mr. Clark's testimony is reliable. First, Mr. Clark has no interest in the subject property and thus no personal stake in the outcome of the lawsuit. As a disinterested person, he has no motive to do anything but tell the truth. Second, Mr. Clark took an interest in the transaction because at the time his parents signed the easement he ran the family cattle business on the subject property. For that reason, as he states in his affidavit, he had an interest in the easement, discussed it with his father, and retains a memory of those discussions. Tr. 890 (Tab 7 of Addendum). With those two indications of reliability, together with the importance of Mr. Clark's testimony and the unavailability of any other evidence

going to the same issue, the interests of justice would best be served by the admission of Mr. Clark's affidavit.

As with almost all evidence, the proper approach to Mr. Clark's testimony is to admit it, and allow the trier of fact to determine the weight it should be given. After cross examination by opposing counsel, it should be evident to the trier of fact whether Mr. Clark's memory is sound or not.

D. Judge Harding Erred in Denying Fox Ridge's Provisional Rule 56(f) Motion for Continuance.

Rule 56(f) of the Utah Rules of Civil Procedure states as follows:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Because of the compressed schedule and lack of any opportunity for meaningful discovery, Fox Ridge filed a provisional Rule 56(f) motion of continuance. Tr. 152.

This case proceeded from complaint to summary judgment in less than 60 days. Fox Ridge received only limited document discovery, and had no opportunity to take depositions. Judge Harding forced Fox Ridge to proceed on an expedited schedule but did not allow Fox Ridge the time or opportunity to respond to certain of PacifiCorp's motions. He also did not allow Fox Ridge the courtesy of ruling in advance on PacifiCorp's motion to bifurcate, and thereby

denied Fox Ridge any opportunity to be heard on its motion for summary judgment on its RDA Claims.

In denying Fox Ridge's Rule 56(f) motion, Judge Harding denied Fox Ridge any opportunity to develop evidence that could have demonstrated the correctness of its position. Indeed, all of the extrinsic evidence discussed in this brief was obtained without the benefit of any meaningful formal discovery; additional relevant evidence most assuredly exists the benefit of which Fox Ridge was denied as a result of Judge Harding's premature ruling. There could well be files or diagrams providing specifications for two and three pole structures; there may be manuals describing towers; there may be witnesses who can explain why the word "towers" was stricken in the Clark Easement and in other contemporaneous easements along the 90th South-Hale Line. Simple fairness would have allowed Fox Ridge time to develop such evidence. In his haste to permit PacifiCorp to meet its construction schedule, however, Judge Harding denied Fox Ridge fairness, due process, and in fact prejudged the case. The least Judge Harding should have done was to grant a Rule 56(f) continuance for a sufficient period of time to permit Fox Ridge to gather evidence. His failure to do so was error.

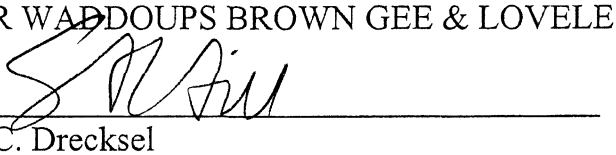
VII. CONCLUSION

For the reasons stated above, Fox Ridge respectfully requests that the Court:

1. Reverse Judge Harding's grant of PacifiCorp's motion for summary judgment on its Easement Claim;
2. Reverse Judge Harding's denial of Fox Ridge's motion for summary judgment on its Easement Claim;
3. Reverse Judge Harding's grant of PacifiCorp's motions to strike; and
4. To the extent not mooted by its rulings on the foregoing, grant Fox Ridge's Rule 56(f) motion for continuance.

DATED: March 7, 2003.

PARR WADDOUPS BROWN GEE & LOVELESS



Paul C. Drecksel
Stephen J. Hill, Of Counsel
James L. Ahlstrom
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March 2003, true and correct copies of the foregoing **APPELLANT BRIEF OF FOX RIDGE PLANNED COMMUNITIES, L.C.** was served via United States first-class mail, postage prepaid, upon the following:

Anthony L. Rampton
Jones Waldo Holbrook & McDonough
170 South Main Street, Suite 1500
P.O. Box 45444
Salt Lake City, Utah 84145-0444

Tab 1

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Exhibit I — Easement, dated June 29, 1989, between Michael M. Carlson, as grantor and Utah Power & Light Company, as grantee.

Exhibit J — Easement, dated May 29, 1996, between Irb. Micron Technology, Incorporated, as grantor and PacifiCorp dba Utah Power & Light Company, as grantee.

Exhibit K — Right of Way Easement between Utah Valley Land Company, as grantor and PacifiCorp, as grantee.

Affidavit of S. Kenly Clark, dated February 27, 2001 .....Tab 7

Supplemental Affidavit of James M. Christensen, dated March 6, 2001 .....Tab 8

Fourth Affidavit of Stephen L. Christensen, dated March 6, 2001.....Tab 9

Bolton and Sick, "Power Lines and Property Values: The Good, the Bad and the Ugly," The Urban Lawyer, The National Quarterly on State and Local Government Law, Vol. 31, No. 2 (Spring 1999) .....Tab 10

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Rules 401, 402, 408, 803, and 804 of the Utah Rules of Evidence)

Tab 2

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

PACIFICORP, dba UTAH POWER, an Oregon corporation, Plaintiff, v. FOX RIDGE PLANNED COMMUNITIES, LLC, a Utah limited liability company; and DOES I through X, inclusive Defendant.	**RULING** 0104-280 Case No. ~~990402401~~ Judge Ray M. Harding

This matter comes before the Court on cross motions for Summary Judgment, Plaintiff's Motions to Strike, Plaintiff's Motion to Bifurcate, and cross Rule 56(f) motions. The Court has reviewed the file, considered the parties' memoranda, heard oral arguments, and being fully advised in the premises issues the following:

RULING

This matter stems from an attempt by Plaintiff (PacifiCorp) to replace existing multiple pole power structures with single steel poles of greater height. Defendant (Fox Ridge) is the current owner of the servient estate. Plaintiff's predecessor in interest (Utah Power & Light) obtained the easement for power lines in 1956, which it used to construct a line in 1957. The original language of conveyance is as follows:

> Grantors . . . hereby convey . . . a perpetual easement and right of way for the erection and continued maintenance, repair, alteration, inspection, relocation and replacement of the electric transmission, distribution, telephone and telegraph circuits of the Grantee, and *one three pole and nine* two pole ~~towers~~ ***structures*** and *4* guy anchors with the necessary guys, stubs, cross arms, braces and other attachments affixed thereto, for the support of said circuits, on, under, over,

> through, and across a tract of land fifty (50) feet in width . . . and being twenty-five (25) feet on each side of the following described center line: [legal description of the easement boundaries omitted].

The conveyance is part of a pre-prepared form entitled Transmission Line Easement. Words in italics were typed into blanks. One word in the form was x-ed out—represented here by overstrike. One word (here shown in bold) was inserted above the x-ed out word.

Parties' Summary Judgment Motions are properly granted only if the Court finds that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law," pursuant to Utah R. Civ. P. 56. "When evaluating a motion for summary judgment, 'a court must consider all of the facts and evidence presented, and every reasonable inference arising therefrom, in a light most favorable to the party opposing the motion.'" Maack v. Resource Design & Const., Inc., 875 P.2d 570, 574 (Utah Ct. App. 1994) (quoting Katzenberger v. State, 735 P.2d 405, 408 (Utah Ct. App. 1987)).

Defendant makes two motions for summary judgment. The first is based on the Redevelopment Plan and is not properly before the Court as it contains claims that may only be brought against entities not joined to this action. *See* U.C.A. § 17A-2-1211(3) - (4) (providing a remedy for violations of a redevelopment plan against the redevelopment agency). Defendant's second summary judgment motion regards scope.

Defendant's Second Motion for Summary Judgment: Scope

Both parties agree that the easement language is clear and unambiguous, and the Court so holds. *See* Memorandum in Support of Fox Ridge's Cross-Motion for Summary Judgment at 16 ("For over 40 years, UP&L strictly abided by the clear and unambiguous provisions of the Clark Easement.") Because there is no ambiguity, the matter is ripe for summary judgment:

> The interpretation of an unambiguous deed is a question of law.

Johnson v. Higley, 989 P.2d 61, 66 (Utah App. 1999).

Defendant moves for summary judgment on the grounds that the granting language of the easement prohibits PacifiCorp's proposed actions. The granting language provides no limits as to steel or height. There are no specific bars to the type of pole Plaintiff wishes to use. Because the grant is for a perpetual easement, it presumes some advances in technology (see discussion below). Defendant is not entitled to a declaratory judgment as a matter of law. Summary Judgment is denied.

Plaintiff's Motion for Summary Judgment

Plaintiff moves for summary judgment based on the plain language of the grant of the easement. Plaintiff points out that this is a "perpetual easement" allowing for "alteration," "relocation," and "replacement." Plaintiff correctly notes that the easement gives no height restriction and does not limit poles to wood. Plaintiff argues that it could replace the existing two-pole wood poles with taller two-pole steel poles and still be within the express language of the easement. Defendant argues that the construction of single steel poles would violate the grant, which specifically provides for "one three pole and nine two pole structures."

Plaintiff cites a series of cases where the grant provided for tradition H-style poles and the courts allowed them to be replaced by taller, single steel poles. In a case with similar facts, Florida Power was granted an "easement forever to construct, operate and maintain an H-frame line." Florida Power Corp. v. Silver Lake Homeowners Assoc., 727 So.2d 1149 (Fla. App. 1999). The court held,

> case law from other jurisdictions indicates that the holder of an electric transmission line easement may avail itself of modern inventions and improvements so long as such action is within the scope of the easement.
>
> In the instant case, FPC reconstructed its power line by replacing the antiquated wooden H-frame structures with modern steel monopole structures. The steel monopole structure is necessarily taller than the wooden H-frame structure as the voltage carried by the power line has been increased. Notwithstanding the steel monopole's taller height, it occupies the exact path of the prior wooden H-frame poles and is completely contained within the same prescribed easement area. We find the reconstruction by FPC to be within the scope of its 1948 easement. Accordingly, the summary judgment is reversed.

Id. (citations omitted). *See also,* Lower Colorado River Authority v. Ashby, 530 S.W.2d 628 (Tex. App. 1975).

Considering the issue of height in Central Power and Light Co. v. Holloway, the court found the general terms of the easement allowed for an increase of height:

> We hold that the terms "reconstruction" and "relocate" as used in this instrument are at least broad enough to include the right to increase the height of the poles and wire upon the reconstruction of the electric transmission line.

431 S.W. 2d 436, 440 (Tex. App. 1968). *See also,* Talty v. Commonwealth Edison Co., 346 N.E.2d 74 (Ill. App. 1976) (holding that because the easement was perpetual, the holder of the easement could take advantage of scientific advancement to install taller, more powerful power lines).

Utah law appears to follow the same reasoning. *Valcarce*, a case regarding a prescriptive rather than express easement, provided for some improvements even when the holder of the easement arguably exceeded the traditional use giving rise to the easement.

> The general rule is that the extent of a prescriptive easement is measured and limited by its historic use during the prescriptive period. "The right cannot be enlarged to place a greater burden or servitude on the property." We note, however, that the common law of Utah requires a different approach to the use of easements than that of England or of our "sister states." In *Big Cottonwood Tanner Ditch Co. v. Moyle*, 109 Utah 213, 174 P.2d 148 (Utah 1946), we explained that Utah law assumes that at the time the prescriptive right arose, the parties concerned knew of the arid nature of our state and contemplated that in the future the water owner would need to prevent waste and accommodate a more efficient use of limited available water. Thus, water users must have contemplated that a ditch might later need to be improved to save water. We therefore held that further reasonable efforts to conserve water could be made by an easement owner so long as they did not unnecessarily burden the servient estate. To this end, an easement owner may install "reasonable and necessary improved structures (not taking more or different land) in order to conserve the water."

Valcarce v. Fitzgerald, 961 P.2d 305, 312-13 (Utah 1998). Utah law permits holders of an express easement providing for replacement and repair to make such improvements as would be

within the scope of the original grant. The Court holds that PacifiCorp's proposed improvements are within the scope of the original grant.

Defendant, Fox Ridge, argues that the increased height of the proposed poles will require additional setbacks, increasing the burden on the servient land. Defendant's setback arguments are unpersuasive. The traditional use of the easement is relevant to prescriptive easements rather than express easements. In the latter, it is the words of the conveyance and not the use to which the land has been put that governs scope. Plaintiff's easement has no limitations as to height. Defendant was aware of the easement when it purchased the property. Defendant, and more importantly, Grantors could not reasonably expect Plaintiff and his predecessor to leave the power lines in their 1957 condition in perpetuity. It is the easement and not the existing poles that burdens the land. If Plaintiff wishes to avail itself of more of its rights than it has in the past, that is its prerogative. Defendant cannot by its changed use of the property limit the scope of the easement.

> [A]lthough the grants of easement did not contain words such as "reconstruct" or "renew," they did grant "a perpetual right to construct, operate, use and maintain" transmission lines. (Emphasis added.) We believe logic alone would justify the finding by the trial court that this was an unlimited grant. Certainly the initial use (construction of a 220KV line) does not indicate any intention to limit the easement to lines of that size since there was no ambiguity in the grant itself. There was no limitation in the easement on the size or the number of the electric transmission lines to be installed which was not difficult to do if the parties had any such intention.

Talty v. Commonwealth Edison Co., 346 N.E.2d 74, 76 (Ill. App. 1976). It is the grant and not the historic use that determines scope.

> The accepted rule is that the language of the grant is the measure and the extent of the right created; and that the easement conveyed should be so construed as to burden the servient estate only to the degree necessary to satisfy the purpose described in the grant.

Weggeland v. Ujifusa, 14 Utah 2d 364, 366; 384 P.2d 590, 591 (Utah 1963). Plaintiff's proposed use is a use described in the grant.

Defendant attempts to raise an issue of material fact by virtue of the overstrike of the word "towers." Defendant cites 3 *Corbin on Contracts* Section 548, page 180, note 21 for the proposition that stricken words may be considered in the interpretation of provisions. Defendant argues that the grantors of the easement thereby intended to prevent the use of power line "towers." Such an argument only has validity if the grantors were the ones to make the deletion. The Court has no admissible evidence before it to that fact. Even assuming that the grantors made the change, the plain language still governs.

The plain meaning of the substituted word, "structures," is broader than "towers." Other cases have described the single steel poles as "steel structures." *See* Florida Power, 727 So.2d 1149, 1151 (Fla. App. 1999). If grantors wished to limit height or prohibit single-pole structures, they could easily have done so. It is a strained reading of the granting language to say that double steel poles would be permissible "structures" and single steel poles would be impermissible "towers." Defendant's argument that the placement of a comma means that the right to inspect, alter, replace, or repair refers only to circuits and not to poles is likewise strained.

The new steel poles are not an improper increase of the scope of the original easement:

> In a leading treatise on the subject, the authors state the general rule to be "when precise language is employed to create an easement, such terminology governs the extent of usage." JON. W. BRUCE AND JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND, p 8.02[1], at 8-3 (rev. ed. 1995).
>
> The general rule does not preclude the scope of an easement being adjusted in the face of changing times to serve the original purpose, so long as the change is consistent with the terms of the original grant:
>
> > It is often said that the parties are to be presumed to have contemplated such a scope for the created easement as would reasonably serve the purposes of the grant. . . . This presumption often allows an expansion of use of the easement, but does not permit a change in use not reasonably foreseeable at the time of establishment of the easement.
>
> RICHARD R. POWELL, 3 POWELL ON REAL PROPERTY § 34.12[2] (Patrick J. Rohan ed., 1996).

Preseault v.United States, 100 F.3d 1525, 1542 (Fed. Cir. 1996).

No valid issue of ambiguity exists. Plaintiff falls within the scope of its easement. Plaintiff's Motion for Summary Judgment is granted.

Plaintiff's Motion for Bifurcation and Cross Motions for Rule 56(f) Relief

The Rule 56(f) motions relate to Defendant's Summary Judgment Motion Re: Redevelopment Issues, which is not yet properly before the Court. Therefore, the Court declines to rule on these motions until the all necessary parties are joined to allow adjudication of the RDA counterclaims. Plaintiff's Motion to Bifurcate has been rendered moot by this Ruling. Defendant's Rule 56(f) Motion is irrelevant to its Motion for Summary Judgment Re: Scope, because the Court and the parties agreed the language was unambiguous and scope could be determined from the face of the document. Any additional discovery would have constituted unnecessary extraneous evidence as to the meaning of the grant.

Plaintiff's Motions to Strike

Plaintiff has filed two motions to strike. The first motion to strike concerns the Carlson Easement, statements in the Christensen and Tolbert Affidavits, and the unsigned Fox Ridge Easement. The Carlson Easement was granted over thirty years after the easement in question and on unrelated land. It is irrelevant to the interpretation of the easement at hand.

The Christensen and Tolbert affidavits make assertions of damages that are purely speculative, list damages to Tractus (a nonparty to these proceedings), and speculate as to the fears of potential buyers and the necessary setbacks.

The unsigned Fox Ridge Easement is properly deemed inadmissible settlement negotiations under Utah Rules of Evidence Rule 408. Plaintiff has every right to attempt to specify the proposed improvements in an amended easement. Yet, if those improvements are within the scope of the original easement, Plaintiff is merely acting out of an abundance of caution in seeking an amended grant. Plaintiff's attempt to settle cannot be used against it. Plaintiff's first motion to strike is granted.

Plaintiff's second motion to strike is directed against a clear violation of the hearsay rule. Defendant attempts to establish the intent of the original parties to the grant by submitting the affidavit of the parties' son. The son makes hearsay statements concerning what his father meant by the overstrike. Defendant claims the statement falls under the general hearsay exceptions of Utah R. Evid. Rules 803(24) and 804(b)(5). These exceptions require "circumstantial guarantees of trustworthiness." An affidavit taken for purposes of litigation more than forty years after the events in question has no special indicia of trustworthiness. To the extent not rendered moot by the Court's ruling that the grant's plain language governs scope, Plaintiff's Motions to Strike are Granted.

CONCLUSION

For the above reasons, the Court hereby rules that:

1. Defendant's Motion for Summary Judgment Re: Scope is DENIED.
2. Plaintiff's Motion for Summary Judgment is GRANTED.
3. Plaintiff's Motions to Strike are GRANTED to the extent they are not moot.
4. Plaintiff's Motion to Bifurcate is DENIED as moot.
5. Defendant's Rule 56(f) Motion is DENIED as moot.
6. All other Motions require additional parties and are not yet properly before the Court.
7. Counsel for Plaintiff shall prepare an order consistent with the terms of this ruling and submit it to opposing counsel for approval as to form prior to submission to the Court for signature, pursuant to Rule 4-504 of the Utah Rules of Judicial Administration.

DATED this 12th day of March, 2001.

RAY M. HARDING, JUDGE

MAILING CERTIFICATE

I hereby certify that on the 12th day of March, 2001, I mailed a true and correct copy of the foregoing to the following, with postage prepaid thereon.

Anthony L. Rampton, 1500 Wells Fargo Plaza, 170 S. Main St., PO Box 45444, Salt Lake City, UT 84145-0444

Rex E. Madsen, 10 Exchange Place, 11th Floor, PO Box 45000, Salt Lake City, UT 84145-5000

L. Woodward
Deputy Court Clerk

Tab 3

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IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

PACIFICORP, dba UTAH POWER,
an Oregon corporation,

Plaintiff,

vs.

FOX RIDGE PLANNED COMMUNITIES, LLC,
a Utah limited liability company;
and DOES I through X, inclusive,

Defendant.

AFFIDAVIT OF
RUSTIN J. TOLBERT

FOX RIDGE PLANNED COMMUNITIES, LLC,
a Utah limited liability company,
and TRACTUS, LLC, a Utah limited
liability company,

Counterclaimants,

vs.

PACIFICORP, an Oregon corporation,
and THE REDEVELOPMENT AGENCY OF
LEHI CITY, a government entity,

Counterclaim defendants.

Case No. 010400280

Judge Ray M. Harding, Jr.

Division 6

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Rustin J. Tolbert, being first duly sworn, deposes and says:

1. I am the Vice President of D.R. Horton and have personal knowledge of the statements made by me in this affidavit.

2. D.R. Horton is one of the largest home builders in the United States and has had considerable experience in the construction of homes within residential subdivisions. In its selection process, D.R. Horton conducts due diligence research before building homes for sale to the public. As a part of its decisions to purchase property for building homes, D.R. Horton avoids building and selling homes in the proximity of high voltage steel towers.

3. Smaller wood poles are a concern, but are much less of a concern than steel towers, even though they may carry the same "voltage," because they have fewer wires and are lower profile, having the appearance of telephone poles and telephone lines.

4. Based upon my experience in selling homes, the public's perception and other issues related to high voltage steel towers are a real concern for D.R. Horton.

5. The very minimum standard for D.R. Horton is to build homes within 100 feet of existing wood pole easements, and 400-600 feet from steel tower easements.

6. D.R. Horton will not build any home closer than 400-600 feet from the easement line if steel towers are constructed on the Fox Ridge Property.

DATED this 14 day of February, 2001.

Rustin J. Tolbert V.P.
Rustin J. Tolbert

SUBSCRIBED AND SWORN to before me this 14 day of February, 2001.

Connie Jean Quintana
NOTARY PUBLIC
Residing in the State of Utah

SEAL:

CONNIE JEAN QUINTANA
Notary Public
State of Utah
My Commission Expires June 28, 2003
390 East Wyandotte Ave., Sandy, UT 84070

N \20755\1\PLEADING\TOLBERT1 AFD

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IN THE FOURTH JUDICIAL DISTRICT COURT

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an Oregon corporation,

Plaintiff,

vs.

FOX RIDGE PLANNED COMMUNITIES, LLC,
a Utah limited liability company;
and DOES I through X, inclusive,

Defendant.

AFFIDAVIT OF
JAMES M. CHRISTENSEN

FOX RIDGE PLANNED COMMUNITIES, LLC,
a Utah limited liability company,
and TRACTUS, LLC, a Utah limited
liability company,

Counterclaimants,

vs.

PACIFICORP, an Oregon corporation,
and THE REDEVELOPMENT AGENCY OF
LEHI CITY, a government entity,

Counterclaim defendants.

Case No. 010400280

Judge Ray M. Harding, Jr.

Division 6

AFFIDAVIT OF JAMES M. CHRISTENSEN

Case No. 010400280

Judge Ray M. Harding, Jr.

Division 6

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

James M. Christensen, being first duly sworn, deposes and says:

1. I am Manager of Fox Ridge Planned Communities, LLC ("Fox Ridge"), have been involved in the daily business activities of the company, and have personal knowledge of the statements made by me in this affidavit.

2. I am familiar with the proposed transmission line, consisting of steel towers, which PacifiCorp plans to construct across Fox Ridge's Property. I am also familiar with the existing wooden pole structures on the Property.

3. If PacifiCorp constructs the proposed transmission line within the right-of-way across approximately 2 miles of Fox Ridge's Property, the damage to Fox Ridge and Tractus, LLC

("Tractus"), will include the following:

a. Loss of an estimated 500-800 residential lots that Fox Ridge otherwise would have been able to develop within the subdivisions on the Property. Loss of these lots would result from the need to provide a "safety corridor" of 400-600 feet on each side of the easement corridor presently located on the Fox Ridge Property for the 90th South-Hale Line. The damages resulting from such losses will be approximately $7-12 million, based on present estimates. Additional damage to Fox Ridge and Tractus would include the following:

i. Loss of revenue that Tractus would have realized from the sale of voice, video, internet and other services to owners of those lots. Although it is presently impossible to determine the amount of such damage, Tractus would lose a presently estimated $3-5 million from such sales.

ii. Fox Ridge would suffer a devaluation of residential lots proximate to the proposed transmission line due to the negative visual impact on lot view and the perceived health fears and safety perceptions among the public and home builders from the line. It is presently impossible to estimate such losses, but based on my experience, the loss would be in the millions of dollars.

iii. Fox Ridge would be required to pay increased expenses and carrying charges on loans for the development of

its Property resulting from the negative impacts on the sales image of the subdivision and the additional time that will be required to market subdivision lots. Again, these losses cannot be quantified with certainty, but based upon my experience, the losses will be in the millions of dollars.

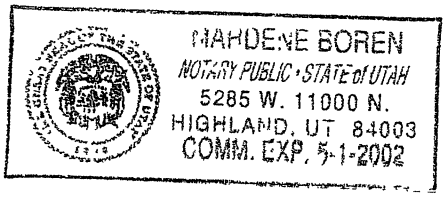
iv. Fox Ridge and Tractus will lose the right to obtain the quality power they need from the existing 90th South-Hale Line and a separate circuit on the Lehi Camp Williams Line with its related facilities. As a result, Fox Ridge and Tractus will be required to pay additional amounts to obtain electric power from more costly and less reliable sources. Fox Ridge is presently investigating the alternatives that are available in this regard. Damages, based on present estimates, are approximately $7-10 million.

4. In connection with the permitting process for the Fox Ridge Property, representatives of Lehi City informed me that Fox Ridge would receive electric power from the 90th South-Hale Line, in addition to other sources.

DATED this 15 day of February, 2001.

James M. Christensen

SUBSCRIBED AND SWORN to before me this 15 day of February, 2001.



NOTARY PUBLIC Expiration - 05-01-2002
Residing in the State of Utah

SEAL:

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Tab 5

REX E. MADSEN (A2052)
KEITH A. CALL (A6708)
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STEPHEN J. HILL, LC
Attorney for Defendants and Counterclaimants
185 South State, 13th Floor
Salt Lake City, Utah 84111
Telephone: (801) 328-1308

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

PACIFICORP, dba UTAH POWER,
an Oregon corporation,

Plaintiff,

vs.

FOX RIDGE PLANNED COMMUNITIES, LLC,
a Utah limited liability company;
and DOES I through X, inclusive,

Defendant.

FIRST AFFIDAVIT OF
STEPHEN L. CHRISTENSEN

FOX RIDGE PLANNED COMMUNITIES, LLC,
a Utah limited liability company,
and TRACTUS, LLC, a Utah limited
liability company,

Counterclaimants,

vs.

PACIFICORP, an Oregon corporation,
and THE REDEVELOPMENT AGENCY OF
LEHI CITY, a government entity,

Counterclaim defendants.

Case No. 010400280

Judge Ray M. Harding, Jr.

Division 6

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Stephen L. Christensen, being first duly sworn, deposes and says:

1. I am the Operations Manager of Fox Ridge Planned Communities, LLC ("Fox Ridge"), am involved in the daily operations and business activities of Fox Ridge, and have personal knowledge of the statements made by me in this affidavit.

2. Fox Ridge is a Utah limited liability company with its principal place of business in Utah County, State of Utah.

3. Tractus, LLC ("Tractus"), is a Utah limited liability company with its principal place of business in Utah County, State of Utah.

4. Fox Ridge is the owner of approximately 2,600 acres of real property located in Utah County, Utah, which it acquired in April of 2000 (the "Property"). The City of Lehi annexed the Property in 1997. The Property runs west to east from I-15 to the Micron campus, and south to north from the Alpine Highway (SR-92) into Traverse Mountain.

5. Fox Ridge is developing the Property into a premier master-planned community to be called Traverse Mountain, which will be the first development of its type in the State of Utah. It will implement the goals and objectives of city planners throughout the State of Utah--including those of the City of Lehi and also Envision Utah, a program developed under the direction of the governor

of the State of Utah. When completed, Traverse Mountain will include over 4 million square feet of office space, retail shops, restaurants, theaters, schools, churches, hospitals, police and fire departments, 3,500 residential homes, nature trails and a nature preserve consisting of approximately 1,200 acres.

6. Pursuant to an agreement with Fox Ridge, Tractus will provide an enhanced data center to Traverse Mountain office tenants and homes with the fastest data connections and network capabilities in the State of Utah. These services will be delivered through Tractus' data center, located in Triumph Technology Park in the southwest and northeast portions of the development.

7. Fox Ridge purchased the Property subject to a 1956 Transmission Line Easement which Fox Ridge's predecessors-in-interest granted to UP&L, PacifiCorp's predecessor-in-interest. This existing transmission line imposed a burden on the Property which Fox Ridge was aware of when it purchased the Property. Fox Ridge considered this burden acceptable for two reasons: (1) aesthetically it was tolerable because the transmission line was supported by wooden poles having the appearance of telephone poles that would require relatively minimal setbacks for developing subdivision lots; and (2) the proximity of the transmission line to the Traverse Mountain planned community, particularly the data center, promised a convenient and reliable source of power.

8. In 1957, UP&L constructed a transmission line, consisting of wooden 2- and 3-pole structures and connecting its substation on

90th South in Salt Lake County to the Hale Substation at the mouth of Provo Canyon in Utah County (then known as the "90th South-Hale Line").

9. Attached to this affidavit as Exhibit "A" is a true copy of an Annexation and Development Agreement obtained by me from the Utah County Recorder. This is a copy of the agreement I reviewed in connection with Fox Ridge's purchase of the Property.

10. Attached to this affidavit as Exhibit "B" is a copy of the Electric Services Agreement, dated June 13, 1995, between Lehi City and Micron Technology, Inc., which is a part of the Annexation and Development Agreement referred to above.

11. Attached to this affidavit as Exhibit "C" is a true and correct copy of a Joint Public Hearing Notice, dated July 12, 1995, which was provided to me by Lehi City.

12. Attached to this affidavit as Exhibit "D" is a true and correct copy of Resolution No. 7-18-95D, dated July 18, 1995, which was provided to me by Lehi City.

13. Attached to this affidavit as Exhibit "E" is a true and correct copy of a Joint Statement at Public Hearing held on August 22, 1995, which was provided to me by Lehi City.

14. Attached to this affidavit as Exhibit "F" is a true and correct copy of Ordinance No. 10-10-95.23, dated August 22, 1995, which was provided to me by Lehi City.

15. Attached to this affidavit as Exhibit "G" is a true and correct copy of Resolution No. 10-10-95G, dated October 10, 1995, which was provided to me by Lehi City.

16. Attached to this affidavit as Exhibit "H" is a true and correct copy of the Alpine Highway Economic Development Plan, Final Plan, dated August 22, 1995, which was provided to me by Lehi City.

17. Attached to this affidavit as Exhibit "I" is a true and correct copy of the Report on Redevelopment Plan entitled "Alpine Highway Economic Development Plan," dated August 22, 1995, which was provided to me by Lehi City.

18. Attached to this affidavit as Exhibit "J" is a true and correct copy of Alpine Highway Economic Development Plan, Project Area Budget, and Taxing Agency Committee's Resolution 01-95, dated September 28, 1995, which was provided to me by Lehi City.

19. Attached to this affidavit as Exhibit "K" is a true and correct copy of an Agreement between the Redevelopment Agency of Lehi City and Lehi City, dated May 13, 1997, which was provided to me by Lehi City.

20. Attached to this affidavit as Exhibit "L" is a true and correct copy of Amendment One to Annexation and Development Agreement, dated May 16, 1997, which was provided to me by Lehi City.

21. Attached to this affidavit as Exhibit "M" is a true and correct copy of an Economic Development Agreement, dated May 16, 1997, between the Redevelopment Agency of Lehi City and Micron Technology, Inc., which was provided to me by Lehi City.

22. The Fox Ridge Property fronts both sides of the existing 2-lane Alpine Highway (SR-92), and its entire frontage would have to be used to widen the highway to four lanes for traffic circulation when the road is widened.

23. In April 2000, Fox Ridge purchased the Property for the purpose of developing the Traverse Mountain planned community. Before purchasing the Property, I reviewed the public record relating to the Micron project. Based on that record, I determined that a new Camp Williams line owned by Lehi City would be built with funds advanced by Micron and later repaid to Micron by the RDA out of tax increment revenues, that the Alpine Highway would be widened to four lanes, and that the existing PacifiCorp 90th South-Hale Line would be unaltered.

24. I have asked PacifiCorp and Micron repeatedly for copies of the Power Purchase Agreement between Micron and PacifiCorp. I still have not received a copy of that agreement, and it is uncertain what the parties agreed to with respect to the "path of delivery" for Lehi's Camp Williams line. I have been informed, however, that the line was to go along the Alpine Highway (SR-92).

25. In the summer of 2000, PacifiCorp notified Fox Ridge for the first time that PacifiCorp intended to remove the existing wood pole structures that have been a part of the 90th South-Hale Line across the Fox Ridge Property for over 40 years. Representatives of PacifiCorp stated to me that PacifiCorp would install single

steel towers and other improvements for the purpose of supplying electric power to the Micron plant.

26. In discussions between representatives of PacifiCorp and me during the summer and fall of 2000, PacifiCorp never told me that it was bringing power from Camp Williams to Micron in a way that was contrary to the Alpine Highway Economic Development Plan, but only said it was "upgrading and modernizing" its line. When I resisted, representatives of PacifiCorp threatened to enter the Fox Ridge Property immediately and begin construction of the line consisting of steel towers.

27. On one occasion, PacifiCorp's representatives threatened that if Fox Ridge did not acquiesce to its demands within two days, it would enter the Fox Ridge Property and commence construction and/or initiate condemnation proceedings.

28. When I requested documents relating to the proposed line and the agreements between Micron and PacifiCorp, both Micron and PacifiCorp refused to provide any such documents.

29. Fox Ridge emphatically denied that the 1956 Easement to which PacifiCorp referred permitted construction of the new line across the Fox Ridge Property, and I informed representatives of PacifiCorp that the proposed construction exceeded the express scope of that easement.

30. Throughout my discussions with representatives of PacifiCorp, I maintained that the subject easement expressly limits PacifiCorp's use of the right-of-way covered by the easement to

electric transmission, telephone and telegraph circuits installed on "one 3-pole structure" and "nine 2-pole structures."

31. I also notified representatives of PacifiCorp that Fox Ridge was developing a master planned community and that construction of single steel towers for Micron and consolidation of the 90th South-Hale Line and the Lehi Camp Williams Line would impose a significantly greater burden on Fox Ridge's property than that permitted by the 1956 Easement. It would also impair Fox Ridge's right to receive quality and affordable power from the 90th South-Hale Line and would significantly devalue the Fox Ridge Property and cause other significant damage to Fox Ridge.

32. Fox Ridge, through its attorney, Mark Rinehart, also notified PacifiCorp, Lehi City and the RDA that PacifiCorp could not proceed with construction of the proposed transmission line because construction and ownership of the line by PacifiCorp would violate (a) the Neighborhood Development Act and the Alpine Highway Economic Development Plan, (b) Fox Ridge's due process rights, and (c) applicable constitutional and statutory provisions requiring fair consideration in return for the transfer and payment of public funds to Micron and PacifiCorp.

33. Attached to this affidavit as Exhibit "N" is a true and correct copy of the Micron Technology, Inc. Request for Proposal For Power Purchase Agreement Submitted to City of Lehi, Utah, dated August 23, 1995, and Lehi's response, which were provided to me by Lehi City.

34. During discussions with me, PacifiCorp's representatives provided me with the computer-enhanced renderings, attached to this affidavit as Exhibit "O," showing the line before and after installation. Although not marked as such, the renderings do not show the true scale difference, thus minimizing the actual visual impact of the steel towers on Fox Ridge's Property.

35. Despite various requests made by me to PacifiCorp, PacifiCorp has refused to provide complete drawings and schematics of the towers and line that PacifiCorp proposes to construct on Fox Ridge's Property. I learned for the first time on February 10, 2001, that some poles may be as high as 102 feet with a 6-foot base diameter, based on documents provided to me by PacifiCorp's counsel.

36. Attached to this affidavit as Exhibit "P" is a true and correct copy of the 90th South-Hale Tap Line Financing and Construction Agreement between PacifiCorp and Micron Technology, Inc., dated December 4, 1995, which was provided to me by PacifiCorp on February 10, 2001.

37. Attached to this affidavit as Exhibit "Q" is a true and correct copy of a Facilities Improvements and Use Agreement between PacifiCorp and Micron Technology, Inc., which is undated and unsigned, which was provided to me by PacifiCorp on February 10, 2001.

38. Attached to this affidavit as Exhibit "R" is a true and correct copy of the Alpine Highway Economic Development Agency,

those parties refuse to provide many of the requested documents because of confidentiality agreements with Micron.

DATED this 15 day of February, 2001.

Stephen L. Christensen

SUBSCRIBED AND SWORN to before me this 15th day of February, 2001.

Alison M. Wood

NOTARY PUBLIC
Residing in the State of Utah

SEAL:

NOTARY PUBLIC
ALISON M. WOOD
10 Exchange Pl., 11th Fl.
Salt Lake City, Utah 84111
My Commission Expires
October 3, 2003
STATE OF UTAH

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Summary of Interest, September 28, 1995, through March 31, 2000, which was provided to me by Lehi City.

39. As of the date of this affidavit, I have observed that PacifiCorp has constructed a portion of the transmission line from the Camp Williams Substation easterly toward I-15, has joined or consolidated the Camp Williams Line with the 90th South-Hale Line, and is preparing to continue construction of its massive steel towers east of I-15 and across Fox Ridge's Property. I have also observed that PacifiCorp has constructed wood pole structures, including a 4-pole structure, within the 90th South-Hale Line easement immediately north of the Micron plant, in preparation to bring the proposed transmission line to the Micron substation.

40. On various occasions since the summer of 2000, representatives of PacifiCorp have advised me that PacifiCorp will not provide electric power to Fox Ridge and that Micron will not permit Lehi City or the RDA to tap into the transmission line proposed to be constructed by PacifiCorp for purposes of supplying power to Fox Ridge.

41. Attached to this affidavit as Exhibit "S" is a true and correct copy of a Micron Technology, Inc., Mutual Confidentiality Agreement, dated March 19, 1999. On numerous occasions, I have spoken to representatives of PacifiCorp, Lehi City, Micron, the RDA and others to obtain documents from them relating to the Alpine Economic Development Plan, the proposed line to be constructed by PacifiCorp, and other details relating to this case, only to have

Tab 6

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STEPHEN J. HILL, LC
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Salt Lake City, Utah 84111
Telephone: (801) 328-1308

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

PACIFICORP, dba UTAH POWER,
an Oregon corporation,

Plaintiff,

vs.

FOX RIDGE PLANNED COMMUNITIES, LLC,
a Utah limited liability company;
and DOES I through X, inclusive,

Defendant.

SECOND AFFIDAVIT OF
STEPHEN L. CHRISTENSEN

FOX RIDGE PLANNED COMMUNITIES, LLC,
a Utah limited liability company,
and TRACTUS, LLC, a Utah limited
liability company,

Counterclaimants,

vs.

PACIFICORP, an Oregon corporation,
and THE REDEVELOPMENT AGENCY OF
LEHI CITY, a government entity,

Counterclaim defendants.

Case No. 010400280

Judge Ray M. Harding, Jr.

Division 6

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Stephen L. Christensen, being first duly sworn, deposes and says:

1. I am the Operations Manager of Fox Ridge Planned Communities, LLC ("Fox Ridge"), am involved in the daily operations and business activities of Fox Ridge, and have personal knowledge of the statements made by me in this affidavit.

2. The Hansen Lime Easement, dated December 10, 1956, a copy of which is attached to plaintiff's Complaint in this action, involves property other than the property of Fox Ridge.

3. In the summer of 2000, representatives of PacifiCorp notified me for the first time that PacifiCorp intended to remove the wood pole structures that have been a part of the 90th South-Hale Line across the Fox Ridge Property for over 40 years, and install a new line using single steel towers with a significantly enlarged pole diameter and height. I have repeatedly requested the exact details of their plans for 8 months. PacifiCorp has been unwilling to provide the requested information. PacifiCorp also intends to install additional high-voltage electric transmission lines, and other enlargements for the purpose of supplying electric power to the Micron plant directly east of the Fox Ridge Property. The proposed new line would be a vertical double circuit that would carry power from the 90th South Substation, the Hale Substation, and another substation located at Camp Williams, as I later learned.

4. The proposed steel towers supporting the proposed new line would average 92 feet in height, based on the limited and incomplete information provided to me by PacifiCorp on February 10, 2001. At least one of the proposed steel towers, based on such information, would be 102 feet in height and have a base diameter of approximately 70 inches.

5. The existing wooden poles along the 90th South-Hale Line across the Fox Ridge Property measure approximately 52 feet in height and have a base diameter of approximately 16 inches.

6. On or about October 10, 1978, Security Title Company and others conveyed an Easement to Utah Power & Light Company for a power line on an undevelopable part of the Fox Ridge Property, near the top of Traverse Mountain in Utah County. A true and correct copy of that Easement is attached to Fox Ridge's Memorandum in Support of Fox Ridge's and Tractus' Cross-Motion for Summary Judgment Re Easement and In Opposition to PacifiCorp's Motion for Summary Judgment as Exhibit "H."

7. In approximately June 2000, representatives of PacifiCorp requested that I come to their office in Salt Lake City and wanted Fox Ridge to sign a new easement to relocate a portion of the line PacifiCorp proposes to construct across Fox Ridge's Property. PacifiCorp's representatives presented the new right-of-way easement to me and asked if Fox Ridge would sign and convey that easement to PacifiCorp. PacifiCorp sought the new easement in

connection with the enlarged power line with steel towers that it now wants to build across Fox Ridge's Property.

8. Representatives of PacifiCorp told me that they had learned that Fox Ridge was the true owner of the Fox Ridge Property and asked Fox Ridge to sign the above easement. They explained that Fox Ridge would be substituted as the grantor of the easement.

DATED this 15 day of February, 2001.

Stephen L. Christensen

SUBSCRIBED AND SWORN to before me this 15th day of February, 2001.

NOTARY PUBLIC
Residing in the State of Utah

SEAL:

NOTARY PUBLIC
ALISON M. WOOD
10 Exchange Pl., 11th Fl.
Salt Lake City, Utah 84111
My Commission Expires
October 3, 2003
STATE OF UTAH

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Tab A

47.

19-

TRANSMISSION LINE EASEMENT

Sylvan W. Clark and Zella R. Clark, his wife, Grantors, of Utah County, Utah, do hereby convey and warrant to UTAH POWER & LIGHT COMPANY, a corporation, its successors in interest and assigns, Grantee, for the sum of One ($1.00) Dollar and other valuable consideration, a perpetual easement and right of way for the erection and continued maintenance, repair, alteration, inspection, relocation and replacement of the electric transmission, distribution, telephone and telegraph circuits of the Grantee, and one three pole and nine two pole structures and 4 guy anchors with the necessary guys, stubs, cross arms, braces and other attachments affixed thereto, for the support of said circuits, on, under, over, through, and across a tract of land fifty (50) feet in width, located in Utah County, Utah, and being twenty-five (25) feet on each side of the following described center line:

Beginning at a point on the west boundary line of the grantor's land, which point is 2090 feet north and 1320 feet west, more or less, from the southeast corner of Section 24, T.4 S., R.1 W., S.L.M., thence S.55°12'E. 1010 feet, more or less, thence S.76°18'E. 6714 feet, more or less, to a fence on the east boundary line of said grantor's land and being in the NE 1/4 of the SE 1/4 of said Section 24, Lots 3 and 4, the SE 1/4 of the SW 1/4, the S 1/2 of the SE 1/4 of Section 19, the SW 1/4 of the SW 1/4 of Section 20, and the NW 1/4 of the NW 1/4 of Section 29, T.4 S., R.1 E., S.L.M.

Together with all rights of ingress and egress necessary or convenient for the full and complete use, occupation and enjoyment of the easement hereby granted, and all rights and privileges incident thereto, including the right to cut and remove timber, trees, brush, overhanging branches and other obstructions which may injure or interfere with the Grantee's use, occupation or enjoyment of this easement.

WITNESS the hands of the Grantors, this 21st day of December, A. D. 1956

Witness:

Sylvan W. Clark

Zella R. Clark

STATE OF UTAH,
County of Utah } ss.

On the 21st day of December, A. D. 1956, personally appeared before me, Sylvan W. Clark and Zella R. Clark, his wife the signers of the foregoing instrument, who duly acknowledged to me that they executed the same.

Notary Public.

My Commission expires:

November 8, 1959

Residing at Salt Lake City, Utah

File No. 27955 622

2720

Utah Power & Light Co

BOOK 738 PAGE 19
THELMA VEST UTAH COUNTY
RECORDER
Thelma Vest DEPUTY

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Tab B

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42.

2716

(Utah Individual)

TRANSMISSION LINE EASEMENT

Edward A. Johnson and Mary LaRue Johnson,

his wife, Grantor S, of Utah County, Utah, do hereby convey and warrant to **UTAH POWER & LIGHT COMPANY**, a corporation, its successors in interest and assigns, Grantee, for the sum of One ($1.00) Dollar and other valuable consideration, a perpetual easement and right of way for the erection and continued maintenance, repair, alteration, inspection, relocation and replacement of the electric transmission, distribution, telephone and telegraph circuits of the Grantee, and no structures ~~xxxxxxxxxx~~ and no guy anchors with the necessary guys, stubs, cross arms, braces and other attachments affixed thereto, for the support of said circuits, on, under, over, through, and across a tract of land fifty (50) feet in width, located in Utah County, Utah, and being twenty-five (25) feet on each side of the following described center line:

Beginning on the south boundary line of the grantor's land at a point 190 feet east, more or less, from the south one quarter corner of Section 16, T.9 S., R.4 E., S.L.M., thence N.44°58'W. 280 feet, more or less, to the west boundary line of said land and being in the SW 1/4 of the SE 1/4 of said Section 16.

Together with all rights of ingress and egress necessary or convenient for the full and complete use, occupation and enjoyment of the easement hereby granted, and all rights and privileges incident thereto, including the right to cut and remove timber, trees, brush, overhanging branches and other obstructions which may injure or interfere with the Grantee's use, occupation or enjoyment of this easement.

WITNESS the hands of the Grantors, this 17th day of October, A. D. 1956.

Witness:

STATE OF UTAH,
County of UTAH. } ss.

On the 17th day of October, 1956, A. D., personally appeared before Edward A. Johnson and Mary LaRue Johnson, his wife

~~xxxxxxxxxx~~ signers of the foregoing instrument, who duly acknowledged to me that they executed the same.

My Commission expires:
November 8, 1959

Notary Public.

Residing at
Salt Lake City, Utah

File No.

APPROVED AS TO DESCRIPTION
D.K.F.

2716
Utah Power & Light Co.
BOOK
FILED AND RECORDED
FEB 21 11 19 AM '57
ABSTRACTED
PROOF READ

6/12 Hanna Bldg.
Salt Lake City
Utah
Attention: O. J. Lee.

42

Tab C

7100

2-49 500 9556

2717

(Utah Individual)

43.

TRANSMISSION LINE EASEMENT

Mary B. Southworth, a widow, ~~xxxxx~~,

~~his wife~~, Grantor..., of Utah County, Utah, does hereby convey and warrant to **UTAH POWER & LIGHT COMPANY**, a corporation, its successors in interest and assigns, Grantee, for the sum of One ($1.00) Dollar and other valuable consideration, a perpetual easement and right of way for the erection and continued maintenance, repair, alteration, inspection, relocation and replacement of the electric transmission, distribution, telephone and telegraph circuits of the Grantee, and one 3-pole structure, ~~xxxxxxxxxx~~ and 6 guy anchors with the necessary guys, stubs, cross arms, braces and other attachments affixed thereto, for the support of said circuits, on, under, over, through, and across a tract of land fifty (50) feet in width, located in Utah County, Utah, and being twenty-five (25) feet on each side of the following described center line:

Beginning on an east boundary line of the grantor's land at a point 1350 feet north, more or less, from the east one quarter corner of Section 18, T.9 S., R.4 E., S.L.M., thence N.65°17'W. 60 feet, more or less, to a north boundary line of said land and being in the SE 1/4 of the NE 1/4 of said Section 18.

Also, beginning on an east boundary line of the grantor's land at a point 770 feet south and 1345 feet west, more or less, from the northeast corner of Section 18, T.9 S., R.4 E., S.L.M., thence N.53°19'W. 1325 feet, more or less, to a north boundary line of said land and being in the NW 1/4 of the NE 1/4 of said Section 18.

Together with all rights of ingress and egress necessary or convenient for the full and complete use, occupation and enjoyment of the easement hereby granted, and all rights and privileges incident thereto, including the right to cut and remove timber, trees, brush, overhanging branches and other obstructions which may injure or interfere with the Grantee's use, occupation or enjoyment of this easement.

WITNESS the hand.... of the Grantor...., this 24th day of Oct., A. D. 19 56

Witness:

Mary B. Southworth

STATE OF UTAH,
County of Escambia } ss.

On the 24th day of Oct., A. D. 19 56, personally appeared before me, Mary B. Southworth and ..... his wife,

the signer.... of the foregoing instrument, who duly acknowledged to me that she executed the same.

My Commission expires:

Jan. 12, 1960

Notary Public.

Residing at County of Escambia, Florida.

File No.....

A216

2717

Utah Power & Light Co.

FEB 21 11 21 AM '57

ABSTRACTED

PROOF READ

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MAILED

Tab D

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48.

2721

(Utah Individual)

TRANSMISSION LINE EASEMENT

GLADYS BECK, a widow, KENNETH J. BECK and MARYLIN R. BECK, his wife, Grantor.s., of Utah County, Utah, do hereby convey and warrant to **UTAH POWER & LIGHT COMPANY**, a corporation, its successors in interest and assigns, Grantee, for the sum of One ($1.00) Dollar and other valuable consideration, a perpetual easement and right of way for the erection and continued maintenance, repair, alteration, inspection, relocation and replacement of the electric transmission, distribution, telephone and telegraph circuits of the Grantee, and one 3-pole structure, 14 two pole ~~XXXX~~ structures and 4 guy anchors with the necessary guys, stubs, cross arms, braces and other attachments affixed thereto, for the support of said circuits, on, under, over, through, and across a tract of land fifty (50) feet in width, located in Utah County, Utah, and being twenty-five (25) feet on each side of the following described center line:

Beginning at a fence on the west boundary line of the grantors' land at a point 115 feet south and 690 feet east, more or less, from the northwest corner of Section 29, T.4 S., R.1 E., S.L.M., thence S.76°18'E. 2717 feet, more or less, thence N.87°44'E. 7314 feet, more or less, to a fence on the east boundary line of said grantors' land and being in the N 1/2 of the N 1/2 of said Section 29, and the N 1/2 of the N 1/2 of Section 28, Township and Range aforesaid.

Together with all rights of ingress and egress necessary or convenient for the full and complete use, occupation and enjoyment of the easement hereby granted, and all rights and privileges incident thereto, including the right to cut and remove timber, trees, brush, overhanging branches and other obstructions which may injure or interfere with the Grantee's use, occupation or enjoyment of this easement.

WITNESS the hand.s. of the Grantor.s., this 2nd day of January, A. D. 1957.

Witness: Gladys Beck

Kenneth J. Beck

Marylin R. Beck

STATE OF UTAH,
County of Salt Lake } ss.

On the 2nd day of January, A. D. 1957, personally appeared before me, GLADYS BECK, a widow, KENNETH J. BECK and MARYLIN R. BECK, his wife the signer.s of the foregoing instrument, who duly acknowledged to me that she executed the same.

Notary Public.

My Commission expires: Nov. 8, 1959

Residing at Salt Lake City, Utah

File No.

NOTARY PUBLIC SALT LAKE CITY, UTAH COMMISSION EXPIRES NOV. 8, 1959

1276

WH

Utah Power & Light Co.

2721

FILED FEB 21 11 27 AM '57

BOOK 182 PAGE 68 UTAH COUNTY RECORDER

ABSTRACTED SEC.

PROOF READ TP

INDEXED R

FEE $1.80 MAIL TO

Tab E

738

91456
2-49 500

2723

(Utah Individual)

2 - 50.

TRANSMISSION LINE EASEMENT

Jay S. Broadbent and Beverly H. Broadbent, his wife, Grantors, of Utah County, Utah, do hereby convey and warrant to UTAH POWER & LIGHT COMPANY, a corporation, its successors in interest and assigns, Grantee, for the sum of One ($1.00) Dollar and other valuable consideration, a perpetual easement and right of way for the erection and continued maintenance, repair, alteration, inspection, relocation and replacement of the electric transmission, distribution, telephone and telegraph circuits of the Grantee, and two pole ~~towers~~ structures and no guy anchors with the necessary guys, stubs, cross arms, braces and other attachments affixed thereto, for the support of said circuits, on, under, over, through, and across a tract of land fifty (50) feet in width, located in Utah County, Utah, and being twenty-five (25) feet on each side of the following described center line:

Beginning at a south boundary line fence of the grantor's land at a point 505 feet east, more or less, from the southwest corner of Section 13, T.8 S., R.3 E., S.L.M., thence N.26°34'E. 1,478 feet, more or less, to a north boundary line fence of said land and being in the SW 1/4 of the SW 1/4 of said Section 13.

Together with all rights of ingress and egress necessary or convenient for the full and complete use, occupation and enjoyment of the easement hereby granted, and all rights and privileges incident thereto, including the right to cut and remove timber, trees, brush, overhanging branches and other obstructions which may injure or interfere with the Grantee's use, occupation or enjoyment of this easement.

WITNESS the hands of the Grantors, this 23rd day of November, A. D. 1956

Witness: Jay S. Broadbent

Beverly H. Broadbent

STATE OF UTAH,
County of Utah } ss.

On the 23rd day of November, A. D. 1956 personally appeared before me, Jay S. Broadbent and Beverly H. Broadbent, his wife, the signers of the foregoing instrument, who duly acknowledged to me that they executed the same.

Notary Public.

My Commission expires: November 8, 1959

Residing at Salt Lake City, Utah

File No.

NOTARY PUBLIC SALT LAKE CITY UTAH EXPIRES NOV. 8 1959

RELEASED AS TO DESCRIPTION

Feb 21 11 29 A '57

2723

Utah Power & Light Co.

BOOK 1211 PAGE 1 UTAH COUNTY RECORDER

ABSTRACTED SEC. TP. R.

PROOF READ INDEXED

FEE $1.60 MAIL TO

Tab F

738

29

2-49 500 103156

50.

2730

(Utah Individual)

TRANSMISSION LINE EASEMENT

REID C. BURGESS, A Widower and G. DALE BURGESS

~~his wife~~, Grantors, of Utah County, Utah, do hereby convey and warrant to **UTAH POWER & LIGHT COMPANY**, a corporation, its successors in interest and assigns, Grantee, for the sum of One ($1.00) Dollar and other valuable consideration, a perpetual easement and right of way for the erection and continued maintenance, repair, alteration, inspection, relocation and replacement of the electric transmission, distribution, telephone and telegraph circuits of the Grantee, and no two pole towers and no guy anchors with the necessary guys, stubs, cross arms, braces and other attachments affixed thereto, for the support of said circuits, on, under, over, through, and across a tract of land fifty (50) feet in width, located in Utah County, Utah, and being twenty-five (25) feet on each side of the following described center line:

Beginning at a fence on the west boundary line of the grantors' land at a point 480 feet south and 1307 feet east, more or less, from the northwest corner of Section 27, T.4 S., R.1 E., S.L.M., thence N.87°44'E. 20 feet, more or less, to the east boundary line of said grantors' land and being in the NW 1/4 of the NW 1/4 of said Section 27.

Together with all rights of ingress and egress necessary or convenient for the full and complete use, occupation and enjoyment of the easement hereby granted, and all rights and privileges incident thereto, including the right to cut and remove timber, trees, brush, overhanging branches and other obstructions which may injure or interfere with the Grantee's use, occupation or enjoyment of this easement.

WITNESS the hands of the Grantors, this 12th day of February, A. D. 1957

Witness: Reid C. Burgess

G. Dale Burgess

STATE OF UTAH,
County of Salt Lake } ss.

On the 12th day of February, A. D. 1957, personally appeared before me, REID C. BURGESS and G. DALE BURGESS, the signers of the foregoing instrument, who duly acknowledged to me that they executed the same.

My Commission expires: Nov. 8, 1959

Notary Public.

Residing at Salt Lake City, Utah

File No.

Utah Power & Light Co.

2730

BOOK 1 PAGE 1 INDEXED

ABSTRACTED

PROOF READ

FEB 21 11 36 AM '57

$4.60

Tab G

46.

TRANSMISSION LINE EASEMENT

Hansen Lime & Stucco Company, a corporation doing business in the State of Utah, Grantor, hereby conveys, and warrants to **UTAH POWER & LIGHT COMPANY,** a corporation, its successors in interest and assigns, Grantee, for the sum of One ($1.00) Dollar and other valuable consideration, a perpetual easement and right of way for the erection and continued maintenance, repair, alteration, inspection, relocation and replacement of the electric transmission, distribution, telephone and telegraph circuits of the Grantee, and one three pole structure, 2 two-pole structures and 6 guy anchors with the necessary guys, stubs, cross arms, braces and other attachments affixed thereto, for the support of said circuits, on, under, over, through and across a tract of land fifty (50) feet in width, located in Utah County, Utah, and being twenty-five (25) feet on each side of the following described center line:

Beginning at a point on the east boundary line of the grantor's land, which point is 2090 feet north and 1320 feet west, more or less, from the southeast corner of Section 24, T.4 S., R.1 W., S.L.M., thence N.55°12'W. 2595 feet, more or less, to the Utah County boundary line and being in the NW 1/4 of the SE 1/4, the SW 1/4 of the NE 1/4 and the SE 1/4 of the NW 1/4 of said Section 24.

Together with all the rights of ingress and egress necessary or convenient for the full and complete use, occupation and enjoyment of the easement hereby granted, and all rights and privileges incident thereto, including the right to cut and remove timber, trees, brush, overhanging branches and other obstructions which may injure or interfere with the Grantee's use, occupation or enjoyment of this easement.

WITNESS the hand of the Grantor, this 10th day of December, A. D. 1956

Hansen Lime & Stucco Company

By [signature]
President.

Witness: [signature]

Attest: Leon E. Mallis
Secretary.

County of Utah)
ss.
STATE OF UTAH,)

On the 10th day of December, A. D. 19 56, personally appeared before me, O. V. Hansen, who being by me duly sworn, did say that he is the President of Hansen Lime & Stucco Company, a corporation, and that said instrument was signed in behalf of said corporation by authority of a resolution of Board of Directors and said O. V. Hansen acknowledged to me that said corporation executed the same.

[signature]
Notary Public.

My Commission expires:

November 8, 1959

Residing at

Salt Lake City, Utah

File No. 27954

609

STATE OF UTAH
COUNTY OF UTAH
I THE UNDERSIGNED RECORDER OF UTAH COUNTY, UTAH DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE COPY OF THE ORIGINAL RECORDED DOCUMENT IN THE OFFICE RECORD IN MY OFFICE AS THE SAME APPEARS IN

ENTRY 42462 PAGES

BOOK 1690 AT PAGE 755-756

WITNESS MY HAND AND SEAL OF SAID OFFICE THIS 5th

DAY OF Feb. 2001

RANDALL A COVINGTON, RECORDER

DEPUTY

608

Tab H

ER 14-1513

42462

UTAH POWER & LIGHT COMPANY

EASEMENT

SECURITY TITLE COMPANY, a corporation, UTAH LAND VALLEY COMPANY, a limited partnership, and ALPINE HILLS COMPANY, a general partnership, Utah County, State of Utah, Grantors, do hereby WARRANT AND CONVEY to UTAH POWER & LIGHT COMPANY, a corporation, its successors in interest and assigns, Grantee, for the sum of One ($1.00) Dollar and other valuable consideration, a perpetual easement and right of way for the erection, operation and continued maintenance, repair, alteration, inspection, relocation and replacement of the electric transmission and distribution circuits of the Grantee, with the necessary poles, towers, guys, stubs, crossarms, braces and other attachments affixed thereto, for the support of said circuits, on, over and across a tract of land located in UTAH COUNTY, UTAH:

> Beginning on the West boundary line of the Grantor's land at a point 900 feet South and 1320 feet West, more or less, from the Northeast corner of Section 24, T. 4 S., R. 1 W., S.L.M., thence N. 50° 13' E. 1064 feet, more or less, to the West boundary line of microwave station site and being in the NE 1/4 of the NE 1/4 of said Section 24, Utah County, Utah, comprising of 4 poles and one guy anchor.

Together with all rights of ingress and egress necessary or convenient for the full and complete use, occupation and enjoyment of the easement hereby granted, and all rights and privileges incident thereto, including the right to cut and remove timber, trees, brush, overhanging branches and other obstructions which may injure or interfere with the Grantee's use, occupation or enjoyment of this easement.

Dated this 10th day of October, 1978.

SECURITY TITLE COMPANY,
a corporation

by _____

H. BRENT HEASLEY,
Attorney for Defendant

UTAH LAND VALLEY COMPANY,
a limited partnership

by _____

THOMAS W. FORSGREN,
Attorney for Plaintiff

ALPINE HILLS COMPANY,
a general partnership

by _____

FILE NO. 42462

606

ER 14-1513

STATE OF UTAH)
)SS
COUNTY OF SALT LAKE)

On the 29 day of Sept, 1978 personally appeared before me M. [illegible] who being by me duly sworn did say that he, the said M. [illegible] is the President of SECURITY TITLE COMPANY, and that the within and foregoing instrument was signed in behalf of said corporation by authority of a resolution of its board of directors and said M. [illegible] duly acknowledged to me that said corporation executed the same and that the seal affixed is the seal of said corporation.

My Commission Expires:

[illegible]

NOTARY PUBLIC

STATE OF UTAH)
)SS
COUNTY OF SALT LAKE)

On the 22nd day of September, 1978 personally appeared before me [illegible], who being by me duly sworn did say that he is one of the partners of UTAH LAND VALLEY COMPANY, a limited partnership, that executed the within instrument and acknowledged to me that such partnership executed the same.

My Commission Expires:

8 9 81

NOTARY PUBLIC

STATE OF UTAH)
)SS
COUNTY OF SALT LAKE)

On the 29th day of September, 1978 personally appeared before me H. Parent Bentley, who being by me duly sworn did say that he is one of the partners of ALPINE HILLS COMPANY, a general partnership, that executed the within instrument and acknowledged to me that such partnership executed the same.

My Commission Expires:

3-12-79

NOTARY PUBLIC

[illegible]

605

Tab I

4830267

UT IND-8/88
LAJ/0623.3

3538881
65061
062389
Page 1 of 2

4830267
02 OCTOBER 89 03:34 PM
KATIE L. DIXON
RECORDER, SALT LAKE COUNTY, UTAH
UTAH POWER AND LIGHT
1407 W NORTH TEMPLE RM 274
SLC, UT 84140
REC BY: D DANGERFIELD , DEPUTY

BURTON D. MAXFIELD
Right of Way Representative
UTAH POWER & LIGHT CO
1849 West North Temple, Suite B, 1[illegible]
Salt Lake City, Utah 8[illegible]

EASEMENT

3R.

Michael M. Carlson and _____, ~~husband and wife~~, Grantor _____, does _____ hereby convey and warrant to PacifiCorp, an Oregon Corporation, dba Utah Power & Light Company, its successors in interest and assigns, Grantee, for the sum of Ten ($10.00) Dollars and other valuable consideration, a perpetual easement and right of way for the erection, operation, maintenance, repair, alteration, enlargement, inspection, relocation and replacement of electric transmission and distribution lines, communications circuits, fiber optic cables and associated facilities, one steel pole and one guy anchor, with the necessary guys, stubs, crossarms, braces and other attachments affixed thereto, for the support of said lines and circuits, on, over, under and across real property located in Salt Lake County, Utah, described as follows:

Along a centerline described as follows:

Beginning in an existing powerline on the Grantor's land at a point 46 feet north and 94 feet east, more or less, from the south one quarter corner of Section 5, T.3 S., R.1 E., S.L.M., thence S.88°15'E. ~~25~~ 10 feet, more or less, thence N.86°21'E. 43 feet, more or less, to the easterly boundary line of said land and being in the SW1/4 of the SE1/4 of said Section 5.

Approved as To Description

One guy anchor described as follows:

One guy anchor located on the Grantor's land at a point 71 feet north and 190 feet east, more or less, from the south one quarter corner of Section 5, T.3 S., R.1 E., S.L.M., and being in the SW1/4 of the SE1/4 of said Section 5.

Together with all rights of ingress and egress necessary or convenient for the full and complete use, occupation and enjoyment of the easement hereby granted, and all rights and privileges incident thereto, including the right to

BOOK 6161 PAGE 810

603

cut and remove timber, trees, brush, overhanging branches and other obstructions which may injure or interfere with the Grantee's use, occupation, or enjoyment of this easement.

WITNESS the hand__ of the Grantor__, this 29th day of June, 1989.

Michael M. Carlson

STATE OF UTAH,)
:ss.
COUNTY OF _____)

On the 29th day of June, 1989, personally appeared before me, Michael M. Carlson and _____, ~~his wife~~, the signer ___ of the foregoing instrument, who duly acknowledged to me that ___ executed the same.

My Commission expires:

9-20-92

Burton Maxfield
Notary Public

Residing at Salt Lake City, Utah

NOTARY PUBLIC
Commission Expires 9-20-92
BURTON MAXFIELD
STATE OF UTAH

Description Approved RWD

Form & Execution Approved _____ File No. 65061

BOOK 6161 PAGE 811

E02

Tab J

UT CORP OH-8/94

PN 107744
May 20, 1996
Page 1 of 4

ENT 46592 BK 3986 PG 530
RANDALL A. COVINGTON
UTAH COUNTY RECORDER
1996 JUN 4 12:22 PM FEE 16.00 BY BT
RECORDED FOR UTAH POWER & LIGHT

EASEMENT

1rb. Micron Technology, Incorporated, a Delaware corporation, doing business in the State of Utah, Grantor, hereby conveys and warrants to PacifiCorp, an Oregon corporation, dba Utah Power & Light Company, whose principal place of business is located at 1407 West North Temple, Salt Lake City, Utah, its successors in interest and assigns, Grantee, for the sum of Ten Dollars ($10.00) and other valuable consideration, a perpetual easement and right of way for the erection, operation, maintenance, repair, alteration, enlargement, inspection, relocation and replacement of electric transmission and distribution lines, communications circuits, fiber optic cables and associated facilities, and four - three pole structures, six - two pole structures, one - four pole switch structure and fourteen guy anchors, with the necessary stubs, crossarms, braces and other attachments affixed thereto, for the support of said lines and circuits, (collectively the "Facilities") on, over, under and across real property located in Utah County, Utah, described as follows:

A right of way 50 feet in width, being 25 feet on each side of the following described survey line:

Beginning at a new pole in an existing power line on the Grantor's land at a point 517 feet south and 824 feet west, more or less, from the northeast corner of Section 28, T. 4 S., R. 1 E., S.L.M., thence S.3°49'E. 1807 feet, thence S.8°14'E. 400 feet on said land and being in E1/2 of the NE1/4 and the NE1/4 of the SE1/4 of said Section 28, containing 2.53 acres, more or less.

Beginning at a new pole in an existing power line on the Grantor's land at a point 514 feet south and 724 feet west, more or less, from the northeast corner of Section 28, T. 4 S., R. 1 E., S.L.M., thence S.2°13'E. 1800 feet, thence S.8°14'E. 400 feet on said land and being in the E1/2 of the NE1/4 and the NE1/4 of the SE1/4 of said Section 28, containing 2.53 acres,

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MAY 2 3 1996

more or less.

One four pole structure described as follows:

One four pole switch structure located in an existing powerline on the Grantor's land at a point 516 feet south and 774 feet west, more or less, from the northeast corner of Section 28, T. 4 S., R. 1 E., S.L.M., and being in the NE1/4 of the NE1/4 of said Section 28.

This easement for the above mentioned new four pole switch structure is granted in accord with and supplements a prior easement dated February 21, 1957 and recorded in the 21st day of February, 1957, in the office of the County Recorder of Utah County, Utah in book 738 at page 20.

A right of way 35 feet in width, being 17.5 feet on each side of the following described centerline:

Beginning at a point in a new three pole structure on the Grantor's land at a point 508 feet south and 729 feet west, more or less, from the northeast corner of Section 28, T. 4 S., R. 1 E., S.L.M., thence N.2°13'W. 70 feet on said land and being in the NE1/4 of the NE1/4 of said Section 28, containing 0.06 of an acre, more or less.

Beginning at a point in a new three pole structure on the Grantor's land at a point 511 feet south and 819 feet west, more or less, from the northeast corner of Section 28, T. 4 S., R. 1 E., S.L.M., thence N.3°49'W. 70 feet on said land and being in the NE1/4 of the NE1/4 of said Section 28, containing 0.06 of an acre, more or less.

Total area 5.18 acres, more or less.

Together with all rights of ingress and egress necessary or convenient for the full and complete use, occupation and enjoyment of the easement hereby granted, and all rights and

privileges incident thereto, including the right to cut and remove timber, trees, brush, overhanging branches and other obstructions which may injure or interfere with the Grantee's use, occupation, or enjoyment of this easement, provided that if Grantor's future use or development of the right of way and easement requires relocation of the Facilities, Grantee agrees to relocate the Facilities.

Grantee shall indemnify, defend, and hold harmless Grantor and its successors and assigns from and against all claims, demands, losses, liabilities, and any other matter whatsoever, and all costs and expenses, including attorneys' fees, incurred in connection therewith for any injuries, death, or damage arising from Grantee's exercise of the right and privileges herein granted.

Nothing contained herein shall prohibit Grantor from building or constructing, or permitting to be built or constructed, curbs, gutters, sidewalks, driveways, parking areas, landscaping and other improvements over and across said right of way, so long as said improvements do not damage the Facilities or violate applicable law. Following the installation or any construction , maintenance, repair, removal, or replacement of the Facilities, Grantee shall, at its expense, restore the surface of the right of way and any construction improvements to the condition of the surface and the construction improvements

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immediately prior to said installation, construction, maintenance, repair, removal, or replacement.

WITNESS the hand(s) of the Grantor(s) this 29th day of May, 1996.

Micron Technology, Inc.
Company

By: _____
Vice President of ~~xxxxxxxxx~~
Lehi Operations

Attest: _____
~~xxxxxxxxx~~

STATE OF UTAH)
:ss
COUNTY OF Utah)

On the 29th day of May, 1996, personally appeared before me, Barney Jurica, who being by me duly sworn did say that he is the VP Lehi Operations ~~xxxxxxx~~ of Micron Technology, Inc., a corporation, and that said instrument was signed in behalf of said corporation by authority of Barney Jurica and said Barney Jurica acknowledged to me that said corporation executed the same.

My Commission expires:
Sept. 26, 1999

_____
Notary Public

Residing at Lehi, Utah

Description Approved _____

NOTARY PUBLIC
KIM M. AUBERGER
779 East 4070 South
Salt Lake City, Utah 84123
My Commission Expires: 9-26-99
State of Utah

c:\wpwin\e\107744.1rb

immediately prior to said installation, construction, maintenance, repair, removal, or replacement.

WITNESS the hand(s) of the Grantor(s) this 29th day of May, 1996.

Micron Technology, Inc.
Company

By: _____
Vice President of ~~XXXXXXXXX~~
Lehi Operations

Attest: _____
~~XXXXXXXXX~~

STATE OF UTAH)
:ss
COUNTY OF Utah)

On the 29th day of May, 1996, personally appeared before me, Barney Jurica, who being by me duly sworn did say that he is the VP Lehi Operations ~~XXXXXXXX~~ of Micron Technology, Inc., a corporation, and that said instrument was signed in behalf of said corporation by authority of Barney Jurica and said Barney Jurica acknowledged to me that said corporation executed the same.

My Commission expires:
Sept 26, 1999

_____
Notary Public

Residing at Lehi, Utah

Description Approved _____

NOTARY PUBLIC
KIM M AUBERGER
779 East 4070 South
Salt Lake City, Utah 84123
My Commission Expires: 9-26-99
State of Utah

c:\wpwin\e\107744.1rb

Tab K

Return To.
Lorne J. Hoggan
PacifiCorp / Utah Power
1407 West North Temple, Suite #110
Salt Lake City, UT 84140

WO PN 201928
ROW File No.. 19990214

RIGHT OF WAY EASEMENT

For value received, **Utah Valley Land Company**, ("Grantor"), hereby grants to **PacifiCorp**, an Oregon corporation, its successors and assigns, ("Grantee"), an easement for a right of way 50 feet in width, more or less, for the construction, reconstruction, operation, maintenance, repair, replacement, enlargement, and removal of electric power transmission, distribution and communication lines and all necessary or desirable accessories and appurtenances thereto, including without limitation: supporting towers, poles, props, guys and anchors, including guys and anchors; wires, fibers, cables and other conductors and conduits therefor; and pads, transformers, switches, vaults and cabinets, along the general course now located by Grantee on, over or under the surface of the real property of Grantor in Utah County, State of Utah, more particularly described as follows and as more particularly described and/or shown on Exhibit A attached hereto and by this reference made a part hereof:

A right of way 50 feet in width, being 25 feet on each side of the following described survey line:

Beginning on the west boundary line of the Grantor's land at a point 441 feet north and 1317 feet west, more or less, from the east one quarter corner of Section 24, T. 4 S., R. 1 W., S.L.M., thence S.45°45'E. 2336.2 feet, more or less, to a point in an existing power line on said land and being in the SE¼ of the NE¼ and the NE¼ of the SE¼ of said Section 24, and in Lot 3 of Section 19, T. 4 S., R. 1 E., S.L.M., containing 2.54 acres, more or less.

Together with the present and (without payment therefor) the future right to keep the right of way clear of all brush, trees, timber, structures, buildings and other hazards which might endanger Grantee's facilities or impede Grantee's activities.

At no time shall Grantor place, use or permit any equipment or material of any kind that exceeds twelve (12) feet in height, light any fires, place or store any flammable materials (other than agricultural crops), on or within the boundaries of the right of way. Subject to the foregoing limitations, the surface of the right of way may be used for agricultural crops and other purposes not inconsistent, as determined by Grantee, with the purposes for which this easement has been granted.

534

The rights and obligations of the parties hereto shall be binding upon and shall benefit their respective heirs, successors and assigns.

DATED this _____ day of _____, 2000.

_____ _____

Grantor(s)

_____ _____

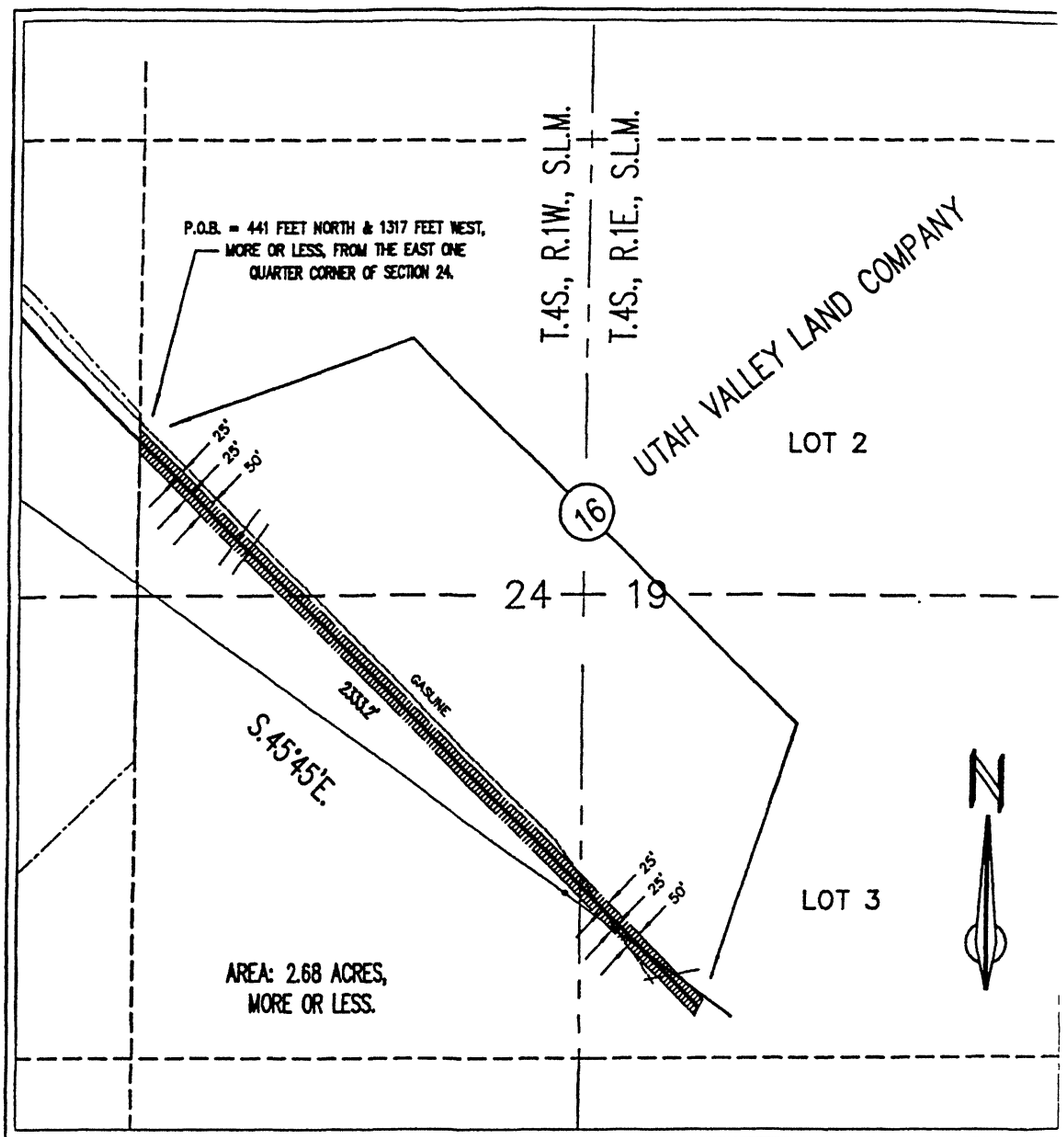
REPRESENTATIVE ACKOWLEDGMENT

STATE OF _____)
)ss.
County of _____)

This instrument was acknowledged before me on this _____ day of _____, 2000, by _____, as _____ of _____.

_____
Notary Public
My Commission Expires:_____

503



DATE: APRIL 26, 2000	EXHIBIT "A"
SPONSOR: STEVE R. PAYNE	CAMP WILLIAMS–MIDWAY–LONE PEAK 138 kV LINE
SURVEYED BY: U.P.&L.\I.E.D.	PRISON TAP TO MICRON SUBSTATION SECTION
DRAWN BY: D. T. BOYD	EASEMENT NO. 16
CHECKED BY: L. Bennett	UTAH COUNTY, UTAH
PLOT SCALE: 1 = 1	PACIFICORP CENTRAL & SOUTHEASTERN AREA
CAD No: 07125Y05.DWG	
APPROVAL RONALD G. OLSEN RGO SUPERVISOR RIGHT OF WAY DESIGN	SCALE: 1" = 400' | SHEET 1 OF 1 | PN 201928 | REV.

Tab 7

REX E. MADSEN (A2052)
KEITH A. CALL (A6708)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendants and Counterclaimants
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000
Telecopy: (801) 363-0400

STEPHEN J. HILL (A1493)
STEPHEN J. HILL, LC
Attorney for Defendants and Counterclaimants
185 South State, 13th Floor
Salt Lake City, Utah 84111
Telephone: (801) 328-1308

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

PACIFICORP, dba UTAH POWER, an Oregon corporation,

Plaintiff,

vs.

FOX RIDGE PLANNED COMMUNITIES, LLC, a Utah limited liability company; and DOES I through X, inclusive,

Defendant.

AFFIDAVIT OF S. KENLY CLARK

FOX RIDGE PLANNED COMMUNITIES, LLC, a Utah limited liability company, and TRACTUS, LLC, a Utah limited liability company,

Counterclaimants,

vs.

PACIFICORP, an Oregon corporation, and THE REDEVELOPMENT AGENCY OF LEHI CITY, a government entity,

Counterclaim defendants.

Case No. 010400280

Judge Ray M. Harding, Jr.

Division 6

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

S. Kenly Clark states under oath as follows:

1. I lived in Lehi, Utah, my entire life until I moved to Tremonton, Utah, about twenty-one years ago. I was born May 18, 1935. I am the son of Sylvan and Zella Clark, both of whom have been deceased for several years.

2. On December 21, 1956, my parents granted a Transmission Line Easement to Utah Power & Light Company. A copy of the easement is attached.

3. At the time my parents signed the easement, I was 21 years old. At that time I was personally running cattle on the property crossed by the easement, which our family called the Low Hills Farm. Up to that time, I had worked side by side with my father nearly every day of my life on that farm, and I continued to work the farm for more than 20 more years.

4. I paid close attention to my parents' negotiations with Utah Power & Light concerning the easement because the power line would affect my cattle business. I discussed the easement many times with my parents.

5. I remember that my parents wanted to revise the original easement form presented to them by Utah Power & Light. They did not want tall steel towers running across the property. They crossed out the word "towers" because they did not want anything larger than the original wooden poles put on the property. The poles were the same size all along the line, and that's all that my parents agreed to.

6. My father was at one time a Utah County Commissioner. He talked to me a lot about the future of the county. He believed it would grow and that eventually our farm could be developed. He told me many time that he thought our property had the most beautiful view in the state of Utah. After the power line was built he often told me that he didn't want anything

larger than the original poles because anything other than that would wreck the view and would hurt the value of the property.

7. I have been told that PacifiCorp, the successor to Utah Power & Light, is now involved in a lawsuit with the current owners of the property over whether it can put large steel towers on the property in place of the original wooden poles. I have also been told that PacifiCorp has told the Court that by striking out the word "towers" and replacing it with the word "structures" my parents actually intended to expand the permissible types of structures that Utah Power & Light could put on our farm. That is not true. My parents crossed out the word "towers" because they did not want large steel towers on the property. They didn't want anything on the property other than the original wooden poles.

S. Kenly Clark

S. Kenly Clark

SUBSCRIBED AND SWORN to before me this 27th day of February, 2001.

Ronald V. Hancock

NOTARY PUBLIC

Residing in the State of Utah

SEAL:

NOTARY PUBLIC
RONALD V. HANCOCK
140 West Main
Tremonton, UT 84337
COMMISSION EXPIRES
MAY 19, 2001
STATE OF UTAH

Tab 8

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IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

PACIFICORP, dba UTAH POWER, an Oregon corporation,

Plaintiff,

vs.

FOX RIDGE PLANNED COMMUNITIES, LLC, a Utah limited liability company; and DOES I through X, inclusive,

Defendant.

SUPPLEMENTAL AFFIDAVIT OF JAMES M. CHRISTENSEN

FOX RIDGE PLANNED COMMUNITIES, LLC, a Utah limited liability company, and TRACTUS, LLC, a Utah limited liability company,

Counterclaimants,

vs.

PACIFICORP, an Oregon corporation, and THE REDEVELOPMENT AGENCY OF LEHI CITY, a government entity,

Counterclaim defendants.

Case No. 010400280

Judge Ray M. Harding, Jr.

Division 6

STATE OF UTAH)
: ss
COUNTY OF SALT LAKE)

James M. Christensen, being first duly sworn, deposes and says:

1. This Affidavit supplements my Affidavit of February 15, 2001 in the above-entitled action

2. The statements made by me in my February 15, 2001 Affidavit are based upon my experience and personal involvement over a period over 20 years as an owner and developer of residential and commercial property.

3. I have had extensive experience with the development of residential and commercial property involving hundreds of millions of dollars during that period of time, and I have worked extensively, oft times on a daily basis, with national and local home builders who purchase residential lots within the subdivisions in which I have been personally involved as a manager of construction and marketing activities.

4. I have personally been involved in a management and supervisory capacity in the construction of thousands of apartments and residences, as well as over a million square feet of commercial space.

5. During my years of experience, I have become well acquainted with the kinds of problems that exist with respect to development and construction activities within the immediate vicinity of electric transmission lines, and have taken active steps to avoid the development of properties and construction of improvements within the vicinity of such lines because of the problems and difficulties they create in the marketing of properties, including particularly residential lots.

6. I have conducted many negotiations with national and local builders who purchase lots for the construction of homes, and I am very familiar with the kinds of factors considered by them in the purchase of such lots.

7. I have been involved in numerous dealings and negotiations with potential builders who have expressed interest in purchasing residential lots within Fox Ridge's property in the present case.

8. In my dealings and negotiations, I have experienced considerable difficulty in attempting to market lots to such builders as a result of the threatened construction by PacifiCorp of its electric transmission line consisting of steel towers and two circuits across Fox Ridge's property.

9. Specifically, those parties do not desire to purchase property within a corridor of approximately 400 to 600 feet on either side of PacifiCorp's line, if PacifiCorp is permitted to construct the line.

DATED this 6th day of March, 2001.

James M. Christensen

SUBSCRIBED AND SWORN to before me this 6th day of March, 2001.

Notary Public

Residing at: _____

NOTARY PUBLIC
ALISON M. WOOD
10 Exchange Pl., 11th Fl.
Salt Lake City, Utah 84111
My Commission Expires
October 3, 2003
STATE OF UTAH

Commission Expires:

10-3-2003

Tab 9

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IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

PACIFICORP, dba UTAH POWER, an Oregon corporation,

Plaintiff,

vs.

FOX RIDGE PLANNED COMMUNITIES, LLC, a Utah limited liability company; and DOES I through X, inclusive,

Defendant.

FOURTH AFFIDAVIT OF STEPHEN L. CHRISTENSEN

FOX RIDGE PLANNED COMMUNITIES, LLC, a Utah limited liability company, and TRACTUS, LLC, a Utah limited liability company,

Counterclaimants,

vs.

PACIFICORP, an Oregon corporation, and THE REDEVELOPMENT AGENCY OF LEHI CITY, a government entity,

Counterclaim defendants.

Case No. 010400280

Judge Ray M. Harding, Jr.

Division 6

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Stephen L. Christensen, being first duly sworn, deposes and says:

1. I am the Operations Manager of Fox Ridge Planned Communities, LLC ("Fox Ridge"), am involved in the daily operations and business activities of Fox Ridge, and have personal knowledge of the statements made by me in this affidavit.

2. In approximately June 2000, I received a call from an individual who stated that he was with PacifiCorp and would like to meet with me at his office. During my conversation with him, I understood that I would be meeting with him and not several other people from PacifiCorp.

3. Because of Fox Ridge's recent acquisition of the property that is the subject of this action, I went to his office. When I arrived, several of PacifiCorp representatives were present. I recall that one of them was Jeff Richards who is PacifiCorp's attorney in the above action.

4. PacifiCorp's representatives explained that they wanted to relocate a portion of the existing power line across Fox Ridge's property and construct a new line in place of the existing wooden poles.

5. They handed me computer-enhanced photographs which they said showed the difference between the new steel towers and wooden poles.

6. They also handed me a three-page document. The first two pages consisted of some easement language they asked me to sign. The last page was a map of the power line easement, showing the general location of the easement corridor and the proposed relocation of a portion of the easement along the northwest portion of Fox Ridge's property. A copy of that document is attached to my affidavit dated February 15, 2001, as Exhibit "K."

7. I informed PacifiCorp's representatives that I had to go back to my office and think about it. I also asked for additional information and stated that I would like to know more about what was going on.

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8. During that meeting, there was no discussion of settlement, any dispute, or any need to resolve differences between PacifiCorp and Fox Ridge. No negotiations concerning any settlement or resolution of any differences occurred.

9. PacifiCorp's representatives simply discussed with me their desire to relocate a portion of the power line easement and construct a new line in place of the existing wooden poles.

10. As I was leaving, I asked PacifiCorp's representatives about their positions at PacifiCorp. I recall that Jeff Richards indicated, at that point, that he was an attorney. I did not know that until he told me at the end of the meeting.

DATED this 6th day of March, 2001.

Stephen L. Christensen

SUBSCRIBED AND SWORN to before me this 6th day of March, 2001.

NOTARY PUBLIC
Residing in the State of Utah

SEAL:

NOTARY PUBLIC
ALISON M. WOOD
10 Exchange Pl., 11th Fl.
Salt Lake City, Utah 84111
My Commission Expires
October 3, 2003
STATE OF UTAH

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Tab 10

31 URBLAW 331
(Cite as: 31 Urb. Law. 331)

Urban Lawyer
Spring, 1999

Symposium, Part I: Institute on Planning, Zoning, and Eminent Domain Southwest Legal Foundation [FNa1]

*331 POWER LINES AND PROPERTY VALUES: THE GOOD, THE BAD, AND THE UGLY

David R. Bolton
Kent A. Sick

I. Introduction

THIS ARTICLE BEGINS with a general review of major scientific and appraisal writings since 1993 on the subject of electromagnetic field radiation (EMF) and their effect on real property values. Further, there is a brief examination of current cases, statutes, and municipal regulations on the subject. Finally, the authors explore the pros and cons of corridor valuation for expansion of existing utility easements, with an emphasis on the right-of-way marketing efforts of several major utility companies and using corridor sales data as opposed to traditional "at the fence" methods.

II. Review of Original Conclusions

In 1993, one of the authors took a long look at the then-current relationship between electric transmission lines and surrounding real estate values. In the article, "Properties Near Power Lines and Valuation Issues: Condemnation or Inverse Condemnation?," [FN1] this author presented a broad overview of the subject including the following:
. An examination of scientific inquiry of the day concerning the existence of actual adverse effects of EMF from major transmission lines on human health;
. Public perception of those effects;
*332 . Straw polls of real estate professionals on their views of whether these lines impact values;
. A survey of 100 residential properties abutting a major power line corridor in Houston relative to their peer properties not next to the line;
. A brief review of four important condemnation cases dealing with the potential impact of EMFs on health and property values, as well as the admissibility of expert appraisal evidence; and
. A developing method for analyzing compensation to landowners for placement of a new power line which took into account an effective easement area, in addition to the actual easement required by the condemning entity.

At the time of the original article, scientific findings on the issue of negative health effects were inconclusive, sending mixed signals to the public. [FN2] The author found, however, that general public perception that EMFs were harmful uniformly drove the values of adjacent property downwards, a finding supported both by his discussions with other real estate professionals and by his residential property study in Houston. [FN3] Emerging

case law at the time supported the admissibility of expert testimony based on "fear in the market place" diminishing the prices of affected properties. [FN4] In addition, some municipalities had already enacted subdivision plat requirements and other regulations which seemed to support the author's effective easement theory. [FN5]

Since 1993, there have been significant developments on all fronts. Scientifically, the debate has reached the lofty halls of the Council of the American Physical Society and the U.S. Academy of Sciences. Real estate professionals, however, even those performing studies on behalf of the power line companies themselves, are continuing to conclude that power lines are bad for property values. On the case law front, in general, there is continuing support for the admissibility of expert appraisal evidence based on "fear in the market place," but there is growing criticism of testimony deemed to be "junk science," fueled by the Daubert and Robinson opinions [FN6]

III. Scientific Conclusions: Still Inconclusive

Scientific investigation of the potential adverse impacts of radiated fields has widened to include not only the low frequency emissions of ***333** transmission lines, the subject of this article, but also high frequency emanations from cellular phones and microwave towers. Though the data indicating that higher frequency emissions may be harmful seems much more settled in the literature than that concerning low frequency emissions, it is probable that public perception blends the two such that general fear of EMF exists in the public mind across the board

A. Good News

In an attempt to quell some concerns, the Council of the American Physical Society, a body of renowned American physicists, issued the following statement in 1995:
The scientific literature and the reports of reviews by other panels show no consistent, significant link between cancer and power line fields.... While it is impossible to prove that no deleterious health effects occur from exposure to any environmental factor,...the conjectures relating cancer to power line fields have not been scientifically substantiated. [FN7]

One year later, the U.S. Academy of Sciences joined the physicists in their conclusions:
[T]he current body of evidence does not show that exposure to these EMFs presents a human health hazard. Specifically, no conclusive and consistent evidence shows that exposure to residential electric and magnetic fields produces cancer, adverse neurobehavioral effects or reproductive and developmental effects [FN8]

These statements were foreshadowed by a British group of epidemiologists known as the Advisory Group on Non-Ionizing Radiation (AGNIR) in 1994. AGNIR, however, reserved judgment on the issue with regard to childhood leukemia: "...[epidemiological] studies do not establish that exposure to electromagnetic fields is a cause of cancer but, taken together, they do provide some evidence to suggest that the possibility exists in the case of childhood leukaemia." [FN9]

B. Bad News

The most recent official pronouncement on the subject reopens the debate and muddies the waters more than ever. In June 1998, an expert panel convened by the National Institute of Environmental Health Sciences (NIEHS) at the behest of Congress issued an alarming press release which concluded that low frequency EMFs, ***334** like those surrounding transmission lines, should be classified as a Group 2B human carcinogen under the International Agency for Research on Cancer classification scheme. [FN10] A Group 2B classification means that "the agent (mixture) is possibly carcinogenic to humans. The exposure circumstances entail exposures that are possibly carcinogenic to humans." [FN11]

C. Ugly News

As both the following look at subsequent appraisal literature and common sense make clear, the continuing scientific uncertainty over the adverse health consequences of EMFs only serves to perpetuate the debilitating effect of power lines on abutting property values.

IV. More Recent Literature and Surveys

A. Hamilton/Schwann

In 1995, two academics named Stanley Hamilton and Gregory Schwann published a highly empirical study of residential home prices in Vancouver, British Columbia. [FN12] The study contrasted sales in four separate Vancouver neighborhoods of residences adjacent to power lines of 60kV or greater from 1985 to 1991. The sample size was impressive, containing 12,907 transactions in the four study areas. The percentage of decreases in property values were not as great as those originally measured in the Houston area in this author's 1993 study. [FN13] Hamilton/Schwann nevertheless concluded to an undeniable drop in value: "We find that properties adjacent to a line lose 6.3 percent of their value due to proximity and the visual impact." [FN14] The well-supported findings presented in this article lead one to conclude that the depressing effect power lines have on property values is not merely an American phenomenon.

B. Cowger/Bottemiller/Cahill

These three real estate professionals employed by the Bonneville Power Administration in Portland, Oregon, published another study in Right ***335** of Way magazine in 1996. [FN15] This study again concluded that overhead transmission lines negatively influence value: "Overhead transmission lines can reduce the value of residential and agricultural property. The impact is usually small (0-10 percent) for single-family residential properties. The greatest impacts have been measured in intensively managed agricultural property (irrigators, etc., and in rural, second (vacation)) home developments." [FN16]

C. Development Strategies Survey

In 1995, a group of real estate consultants in Missouri conducted a survey of residential brokers and salespersons, some 167 professionals, all in the St. Louis area. [FN17] The results were published in a study concluding that 54 percent of those surveyed believed high voltage overhead electric transmission lines (HVOETLs) "very negatively affected" residential property values; another 23.8 percent considered HVOETLs to "somewhat negatively" affect property values. [FN18]

D. Rikon Article

In January 1996, a New York attorney named Michael Rikon published an article in the Appraisal Journal following up on the landmark Criscuola [FN19] decision, which had just been handed down at the time of this author's original paper. [FN20] Criscuola was the New York Supreme Court decision allowing appraisal evidence in transmission line cases to be based upon fear in the marketplace, rather than actual epidemiological evidence of adverse health effects from EMFs. [FN21] Rikon noted that the Criscuola court's embrace of the "fear in the marketplace" theory of damages had spread beyond transmission line cases to include actions against a cell phone provider to stop construction of a tower, against Amtrak to oppose electrification of its tracks in New York, and in increasing numbers of inverse condemnation cases. [FN22] Clearly, the Criscuola buzz continues to grow.

***336** E. Gimmy Seminar

In late 1994, Arthur Gimmy, MAI, presented a seminar before the EMF Regulation and Litigation Institute. [FN23] In part, the seminar presented a matched-sales analysis of California residential property that indicated diminutions in lot values from properties abutting power line easements of 18 percent to a whopping 53.8 percent. [FN24] While the methodology employed in this study does not seem as rigorously empirical as that used by Hamilton/Schwann, it may demonstrate that California landowners are more sensitive to the EMF property devaluation issue than those in British Columbia.

F. LCRA Commissioned Study

More recently, in late 1997 the Lower Colorado River Authority (LCRA) commissioned a study to quantify the property value impact of electric transmission lines in and around Georgetown, Texas. [FN25] The study was performed by a local MAI who the LCRA had also hired to do all of the appraisal work for the concurrent acquisition of numerous easement parcels for a new 138kV line. Well over 100 real estate transactions were analyzed, including both sales from eight different residential subdivisions and vacant land sales. Even in a study prepared for a condemning entity in connection with a number of pending acquisitions, undeniable value damage was found: "From the data analyzed, it is concluded that from an overall value perspective, an electric transmission line easement has less than a 10 percent impact on price, and in most instances, less than a 5 percent impact on price." [FN26]

It is important to note that the appraiser in this study was referring to a 10 percent overall impact on price, not just on the value of the land immediately affected by or adjacent to the easement. [FN27] For those areas, he reached a specific conclusion:
...[I]t is concluded that the area located within an electric transmission line easement has a 90% diminution in value due to the presence of the easement...[and] it is concluded that an area 200 feet wide adjoining the proposed easement has some diminished value. The extent of the diminished value can be dependent on various factors which would include the location of the easement relative to the whole tract, and the physical characteristics of the remainder. [FN28]

***337** This author's original 1993 estimate as to the probable width of an effective easement was 150 feet on either side of the actual easement. [FN29] The fact that a study prepared on behalf of a major Texas condemnor reached a similar conclusion demonstrates the validity of the effective easement theory.

V. Municipal Regulations and Statutes: More Bad News

A. Setback Requirements

Since the original article, this author has become aware of building setback requirements from HVOETLs imposed by a few Texas municipalities that convert effective easements from theory to undeniable reality in some jurisdictions. For instance, the Town of Flower Mound, Texas (just north of Fort Worth) mandates that no building be constructed within 100 feet of the edge of the right-of-way or easement of any high voltage (60kV or higher) electrical transmission line. [FN30]

Although its requirements are not as concrete as those of Flower Mound, the City of Red Oak, Texas (south of Dallas) has enacted similar restrictions tied to height. [FN31] In Red Oak, buildings in residentially zoned areas adjacent to elevated power lines or towers must be set back an additional one foot for every foot by which the neighboring transmission line or tower exceeds fifteen feet. [FN32] For instance, if a residential property abuts a 90-foot high transmission line or tower, an additional 75-foot building setback would be imposed. The City of Plano has related provisions tied to tower or line height. [FN33] Obviously, all other things being equal, a

purchaser comparing properties affected by these regulation-imposed effective easements would pay quite a bit less for them than for other competing properties unaffected by such setbacks.

B. Potential Legal Liability

In addition, the Texas Health and Safety Code contains at least one provision related to high voltage power lines (anything over 600 volts) that the authors suspect could have a chilling effect on the values of the underlying servient estate beneath an electric line easement. Chapter 752 of the Code sets out a host of prohibited activities in and around power lines, such as restrictions on operation of certain types of machinery ***338** or structures near the line without posting a statutorily required warning. [FN34] Curiously, the Texas Legislature even saw fit to declare violation of this chapter a criminal offense punishable by jail time, fines, or both. [FN35] Perhaps the most damaging provision, however, is the one that establishes civil liability to the power line company for any contacts with the line caused by violations of the statute:

If a violation of this chapter results in physical or electrical contact with a high voltage overhead line, the person, firm, corporation, or association that committed the violation is liable to the owner or operator of the line for all damages to the facilities and for all liability that the owner or operator incurs as a result of the contact. [FN36]

While at first blush an underlying landowner's liability to a power line company for a downed transmission line or tower seems obvious, the effective global indemnity of the line operator contained in the last clause could negatively impact underlying property values.

Consider this hypothetical example. Developer John, whose 300 acre tract is bisected by a 138kV power line easement, is preparing the surface of his newly subdivided tract for roadways with a bulldozer. Inadvertently, the operator of the bulldozer bumps one of the towers supporting the line. The tower, having been incorrectly engineered and installed by the power company, immediately falls over on the operator, instantly killing him and knocking out power to all users serviced by the line. One of the users, a major semiconductor manufacturer, sues the power line company for consequential damages flowing from the manufacturer's closure of two full shifts while the line was being repaired and re-energized. Can Developer John possibly be held liable?

In 1984, a federal court sitting in Texas concluded that the "all liability incurred" language of the statute provided full indemnity to an electric utility for any claims arising out of any violation, including liability for the electric utility's own negligence. [FN37] Subsequently, in 1991, a Texas appeals court held the language extended even to the "violator" being responsible for the power line operator's attorney fees, costs, and interest. [FN38] There are few--if any--other types of "improvements" to real estate that require an underlying landowner to be responsible for someone else's negligence.

***339 VI. A Quick Case Review**

A. Old Cases

The author's first look at power lines and diminished property values in 1993 contained synopses of three cases from across the country standing for the proposition that fear in the minds of potential purchasers of real estate was an admissible element of damages in a statutory condemnation proceeding. [FN39] These cases--Criscuola [FN40] from New York, Ryan [FN41] from Kansas, and Daley [FN42] from California--have all survived the appellate process and continue to be controlling law in their respective jurisdictions.

One important distinction has been drawn from this principle of law, however, at least in California. In San Diego Gas & Electric Co. v Superior Court, [FN43] a landowner tried to make out a claim for inverse condemnation caused by a pre-existing power line based in part on a diminution in value of his property due to fear in the marketplace of EMFs. The court declined to accept that Daley controlled, but rather the court held that while fear

in the marketplace was an acceptable element of damages in a conventional condemnation, such fear could not create a new cause of action for inverse condemnation when the power line in question already exists. [FN44]

B. Coker

One relatively recent federal case merits discussion, though it does not directly involve power lines. In United States v. 14.38 Acres of Land, [FN45] the Fifth Circuit Court of Appeals embraced the fear in the marketplace theory of damages. Coker involved a condemnation for a new levee which the landowner's appraiser testified would create "fear" that land on the river side of the levee would be significantly more likely to flood, thus decreasing its market value [FN46] The court upheld the admissibility of this testimony in this context, relying on a prior power line case:
Causes of diminution of market value, [such as] the construction of a powerline carrying high voltage electricity across a tract of land which create in the general ***340** public fears which make the property less desirable and thus diminish the market value of the property are proper to be considered, though as a separate item of damage might be too speculative and conjectural to be submitted to the Court [FN47]

Interestingly, the lower court in Coker had excluded entirely the testimony of Coker's appraisal expert, finding essentially that his opinions were "junk science" under the Supreme Court's now famous 1993 opinion in Daubert [FN48] In holding that Coker's expert should have been allowed to testify, the court observed:
The value of property taken by the Government...is largely a matter of opinion. Since there are no infallible means of determining with absolute conviction what a willing buyer would have paid a willing seller for the condemnee's property at the time of taking, eminent domain proceedings commonly pit the Government's valuation experts against those of the landowner.... Recognizing the critical role of expert witnesses in these cases and the strong interest on both sides that compensation be just, trial courts should proceed cautiously before removing from the jury's consideration expert assessments of value which may prove helpful. [FN49]

The Coker court thus acknowledged the obvious: "how much" in any given condemnation case, particularly one involving the establishment or expansion of high voltage power lines, will always be a matter of opinion for competing appraisal experts to set forth and for a fact finder to ultimately decide.

VII. Newer Issues: Utility Corridors Can Be Extremely Valuable

Within the past few years a new industry has emerged requiring the use of right-of-way corridors for communication lines and fiber optic cables. These communication lines are responsible for transmitting data involving national security, banking, world wide web, teleconferencing, and most types of data transmission. What better avenues to install the hardware necessary for this product than existing utility corridors, which already offer the physical, economic, and legal attributes for this kind of use.

A ATF or True Market Value? A Question of Highest and Best Use

Acquiring rights for communication lines by condemning entities has been fairly rare until recently, primarily because there was no need. As the need for communication lines increased, the utility companies ***341** have begun to acquire these property rights. Naturally, the valuation issue is now becoming a factor. The position taken by most companies with the power of eminent domain is that the value of the property rights is simply the pro rata share of the easement value as determined by the "at the fence" (ATF) prices.

From a pure appraisal perspective, this method is inappropriate and does not conform with generally accepted appraisal practices set forth in the Uniform Standards of Professional Appraisal Practices (USPAP). "In developing a real property appraisal, an appraiser must be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal." [FN50] The foundation of proper

appraisal methodology is an analysis of a property's value based on its highest and best use, defined as "[t]he reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value." [FN51] The basis for appraising property rights of this type is plainly set out in the Appraisal Institute's textbook, which is universally accepted as the best authority: "Analysis of the highest and best use of the property as though vacant and of the property as improved is essential in the valuation process." [FN52]

In the evaluation of a taking of additional property rights within an existing right of way corridor, very rarely can the highest and best use be anything other than for those kind of uses that are already found within the corridor. That being the case, those property rights being acquired must be appraised based on that highest and best use. ATF prices rarely have anything to do with the market value of property rights within the established corridor.

B. Corridor Property Availability

The proper method for appraising properties within a corridor is to use market data occurring within a corridor. There is a vast amount of existing corridor space currently available, literally hundreds of thousands of miles. If buyers and sellers for a particular type of property exist in the marketplace, then market data will be available to the appraiser Consider the following examples of corridor property availability:
***342** . Union Pacific advertised on the rear cover of Right of Way from at least 1993 through 1996. [FN53] With a map showing the approximate locations of their corridors, the ad states:

```
 20,000 Mile Right of Way Corridor and Sites Available Throughout the West

Transmission Lines                    Signboard Sites

Electrical                            Industrial Sites

Pipelines                             Water Rights
```

One major Texas power line company advertises the sale or lease of rights-of-way corridor properties located throughout southeast Texas for various uses, including mineralleasing, commercial leasing, drainage easements, roadways, pipeline easements (private), commercial large-demand pipelines, and for communication uses.
. Another national pipeline company advertises its right-of-way corridors for lease only, with lease rates being based on an annual amount per mile.
. The Lower Colorado River Authority has made leases for communication lines based on a rate for each fiber, per mile, per month. Indeed, the LCRA openly solicits fiber optic easement customers over the Internet:
LCRA has 18 dark strands from Austin to Lake Buchanan, 30 dark fiber strands from Austin to LaGrange and 24 dark fiber from Austin to San Antonio available for license The terms of the license, price, and fiber count are negotiable. Typically, the primary term of the license will be 15 years...with an option to renew for 10 years.
In order to expand the fiber routes beyond the core river system, the LCRA seeks proposals from Carriers. Depending upon the amount of fiber requested in a proposal, LCRA will install the fiber cable and license dark fiber reserve capacity to a third party. The LCRA is positioned to leverage its transmission ROW and towers, which includes approximately 2,300 miles of transmission lines and over 200 electric substations. [FN54]

These advertisements have all the earmarks of typical market forces at work. Without doubt, these examples are indicative of market data for rights-of-way throughout Texas and the United States for established easement corridors.

C. What Happened to the Landowner's Rights?

Usually forgotten are the underlying rights of ownership of the landowner. When a utility company has obtained the right of way and ***343** created a corridor, but has not obtained a specific property right (i.e., a fiber optic cable), then the value to the property owner should be assessed or appraised based on its highest and best use. This conclusion necessitates that market data (sale and lease) within utility corridors be used for comparison purposes. It is inappropriate to use ATF prices when evaluating the rights of ownership within the corridor for a condemning authority and ignore the data and evaluation methods used when the same rights are sold or leased to users of corridor properties.

1. EXPANDING AN EXISTING EASEMENT: THE CONDEMNOR'S VALUATION

Consider this scenario. A major utility company owns a prior easement which grants the rights for three electric transmission lines across an approximate 110 acre tract of land in central Texas. A petition is filed to obtain additional property rights within the easement for the right to construct, place, operate, maintain, reconstruct, replace, rebuild, upgrade, remove, inspect, patrol, and repair communication lines and facilities and all necessary and desirable appurtenances on, across, and within the property. The proposed easement is within the existing 75-foot easement and the length is approximately 1,849 lineal feet or about 113 rods.

Citing sales data averaging about 150 acres in size and prices averaging about $1,000 per acre, the utility company's appraiser concludes to a market value for the communication easement with the following:
3.24 acres (area of the existing easement) x $1000 per acre = $3,224 Value of the property rights within the existing easement 95% or $3,078 Value of the Communication Easement 5% or $162

2. THE LANDOWNER'S VALUATION

Assume for purposes of this hypothetical that the condemnor utility company had recently leased a fiber optic line to a communication company on the basis of $21,312 per year, equating to a value of $266,400 (based on a capitalization rate of .08) or $832 per rod. Utilizing this and other actual market data of sales and lease information from comparable corridor uses averaging between $300 per rod and $880 per rod, the landowner's appraiser, considering the property's true highest and best use, could conclude to a significantly higher value:
113 Rods x $500 per rod = $56,000

Given the foregoing example, it seems manifestly unreasonable for a utility company to consider only the ATF value when it is purchasing an easement and then turn around and sell or lease the same easement, based on its true highest and best use, for an exponential profit.

*344 VIII. Arguments Against Corridor Valuation Theory

A. Corridor Transactions Are Inadmissible Data

The traditional rule in Texas has long been that market data involving entities with the power of eminent domain are legally inadmissible to determine just compensation, because such transactions are not arms-length as a matter of law. [FN55] There are obvious inequities raised when a utility company is allowed to take using one valuation method and sell based on another. This fact, considered along with the rationale behind the prohibition against sales involving condemnors, leads the authors to believe that a good faith argument exists for the extension of the existing law.

1. DOES THE EXISTING RULE MAKE SENSE HERE?

The Texas prohibition against using transactions involving condemning entities really arose in the context of appraisers using sales to condemning entities as opposed to from them. As one court stated, "The reason for excluding proof of such sales is that they do not meet the willing seller- willing buyer concept; they are made under a direct or an implied threat of condemnation and, theoretically at least, are not free and voluntary." [FN56]

Applied in that context, the rule makes perfect sense. But what about when a condemnor is advertising to sell right-of-way, or the right to use right-of- way? Potential purchasers are not compelled to buy at that condemnor's price; they can condemn their own right-of-way elsewhere or purchase from some other supplier. It seems logical that a meeting of the minds has occurred when a purchaser acquires rights for an advertised price, and that such sales (or leases) constitute competent market evidence, regardless of whether one or both parties to the transaction possess the power of eminent domain.

2. BAUER v. LAVACA-NAVIDAD RIVER AUTHORITY

At least one Texas case indicates that if a landowner demonstrates that the highest and best use of desired property is for an easement corridor, then corridor sales are appropriate data to consider in the appraisal problem. [FN57] In Bauer, the River Authority sought to condemn a 50-foot ***345** wide water line easement across Bauer's property. [FN58] The location of the desired easement was in the midst of an established, 432-foot wide "easement corridor" containing eight other easements previously granted to various oil companies and electric utilities. [FN59] The court held that Bauer should have been permitted at trial to prove that the highest and best use of his property was for an easement corridor. [FN60] Further, the court found that sales of easement rights-of-way within such corridors were relevant and admissible, provided the sales did not involve entities with the power of eminent domain. [FN61] In the opinion, the court set out a guideline to determine when such evidence was proper:
...[A]ppellant Bauer offered testimony that the highest and best use of the land in question was the sale of pipeline easements in his "pipeline corridor." He showed that the corridor was well-defined, and he offered testimony regarding the value of the condemned land by showing what he and his neighbor received for the sale of other pipeline easements to prior companies.... Bauer's right to have the fact finder consider the land's highest and best use in determining its market value was thus denied. [FN62]

The undisturbed holding of Bauer leaves open the right of Texas landowners to claim an easement corridor as highest and best use and hints that sales from condemning entities of corridor rights-of-way may become fair game for an appraiser to consider when determining value for this property.

3. OTHER SUPPORT FOR USING SALES FROM CONDEMNORS

Other limited support for the valid use of comparable market data involving public or quasi-public entities comes from various environmental groups and some right-of-way professionals. Their position calls "for the inclusion of a highest and best use for environmental preservation in a real estate appraisal based on comparable market data evidence. Some of the Environmental Value Proponents argue for use of public agency comparable sales data, some for private sales data and some for both." [FN63]

In the State of California, where most of the debate over this issue originates, there is, in addition to prevailing case law, a provision in their evidence code which: "(i) allows for a merger of the appraised ***346** highest and best use of a property and the use for which a public entity is acquiring it; and (ii) allows use of prices paid by public agencies for open space as comparables for valuation purposes where such purchases were voluntary and not under the 'threat of condemnation."' [FN64]

Certainly, the current argument against using market data involving a party having the power of eminent domain predominates. The inherent inequity of this rule in the context of corridor valuation, however, calls for modification of existing Texas law. Regardless, appraisers ought to acknowledge market reality.

B The Condemnor Created the Value

Another argument commonly urged by condemnor utility companies is that they created the corridors through the original acquisition such that any future benefit would accrue to their rights of ownership

Consider the following example that exposes the flaw in this logic. The State Highway Department builds a new freeway along the property line of Mr Jones's farm near the edge of town, creating valuable commercial frontage. A couple of years after completion, Wal-Mart comes along and wants to purchase Mr. Jones's farm which now has frontage along a new freeway Mr Jones contributed no land nor any monies for the construction of the roadway. Should the value of his property be based on who assembled the right of way or who built the roadway? Obviously, once the road is built, future appraisals of Mr Jones's property would be based on its new highest and best use, without regard to who built the road Likewise, when appraising property rights within a corridor, no consideration should be given to the creator of the corridor

C It's Not a Corridor, It's a Closet

The third emerging argument against corridor valuation is that usually the underlying property owner possesses only a small portion of the corridor and that value is only created when the whole corridor is assembled. Again, the value should be determined by analyzing market data such as the following (actual) transactions by a southeast Texas utility company.

June 1993 to June 1998, 2-5 year options, 7 87 rods leased to a restaurant
May 18. 1996. to May 19, 1998 (one day), 167 rods leased for parking
***347** September 1, 1990, to August 31, 1990, lease extended, 29 rods leased to a public university on the basis of $1,476 per rod
January 1, 1996, to December 31, 2001, 2-5 year options, 9 rods leased for parking
Easement granted for 113 rods for a telecommunication cable to another utility company

Given these actual transactions, it is plain that any one segment of the corridor, regardless of length, is much more valuable than traditional ATF valuations

For now. it is true that current law (in Texas anyway) discourages using sales between condemning entities as market data The extremely active marketing efforts of power line and pipeline companies, however, coupled with increasing amounts of actual sales data point to corridor valuation for expansion of existing easements as the only logical way of conforming with the Uniform Standards of Appraisal Practice Perhaps our Native American forebears had it right all along

Back in the days when agents representing a newly formed railroad were buying land for right of way they encountered some shrewd bargainers among the Indians One Chief was asked whether he would sell a small eroded piece of land

"Sure. me sell for $50,000," said the Chief

"$50,000! Why that land is no good for planting or pasture It is just no good for anything!" the agent exclaimed

The Chief grunted, "It heep good for railroad " [FN65]

[FNa1] The following article is the first in a series presented at the Southwestern Legal Foundation Symposium on issues of Planning, Zoning, and Eminent Domain This and additional papers also appear in an annual series entitled Institute on Planning. Zoning, and Eminent Domain published by Matthew Bender, Co (New York 1999). The Urban Lawyer welcomes the Institute's input and looks forward to bringing members of the State and Local Government Law Section a review of selected papers during next year's symposium

[FN1] David R Bolton, Properties Near Power Lines and Valuation Issues Condemnation or Inverse Condemnation?, 1994 INST ON PLANNING, ZONING, AND EMINENT DOMAIN 13-1

[FN2] Id at 13-6.7

[FN3] Id at 13-9.10

[FN4] Id at 13-15.16

[FN5] Id at 13-9 through 13-13

[FN6] Daubert v Merrell Dow Pharmaceuticals, Inc , 509 U S 579 (1993), E I du Pont de Nemours & Co v Robinson, 923 S W 2d 549 (Tex 1995)

[FN7] Council of The American Physical Society, Power Line Fields and Public Health, Public Statement issued Apr 22, 1995

[FN8] NATIONAL RESEARCH COUNCIL, POSSIBLE HEALTH EFFECTS OF EXPOSURE TO RESIDENTIAL ELECTRIC AND MAGNETIC FIELDS (1997)

[FN9] NRPB, Electromagnetic Fields and the Risk of Cancer Supplementary Report by the Advisory Group on Non-Ionizing Radiation (Apr 12, 1994) <http // www nrpb org uk/Absd5-2 htm>

[FN10] Working Group Report Assessment of Health Effects from Exposure to Power-Line Frequency Electric and Magnetic Fields (Christopher J Portier, Ph D & Mary S Wolfe, Ph D , eds , June 24, 1998) <http // www niehs nih gov/emfrapid/html/WGReport/Chapter5 html>

[FN11] Id

[FN12] Stanley W Hamilton & Gregory M Schwann, Do High Voltage Electric Transmission Lines Affect Property Value?, LAND ECON , Nov 1, 1995, 436

[FN13] See Bolton, supra note 1, at 13-10

[FN14] Hamilton & Schwann, supra note 12

[FN15] J R Cowger et al , Transmission Line Impact on Residential Property, RIGHT OF WAY, Sept /Oct. 1996

[FN16] Id

[FN17] Development Strategies, Inc , Value of Residential Property Proximate to High Voltage Overhead Electric

Transmission Lines, (1995).

[FN18]. Id.

[FN19]. Criscuola v. Power Auth. of State of New York, 621 N.E.2d 1195 (N.Y. 1993).

[FN20]. Michael Rikon, Electromagnetic Radiation Field Property Devaluation, THE APPRAISAL J., Jan. 1996, at 87.

[FN21]. Criscuola, 621 N.E.2d at 652.

[FN22]. Rikon, supra note 20, at 89.

[FN23]. Arthur Gimmy, The Potential Impact of EMF On Property Values, EMF REG. AND LITIG. INST., New Orleans. (1994).

[FN24]. Id.

[FN25]. Larry Kokel, Impact of Electric Transmission Lines on Value, Study prepared for LCRA (1997).

[FN26]. Id. at 94.

[FN27]. Id.

[FN28]. Id.

[FN29] Bolton, supra note 1, at 13-17.

[FN30]. FLOWER MOUND, TEX., LAND DEVELOPMENT CODE § 3.05(d)(8) (1994).

[FN31]. RED OAK, TEX., UNIFIED DEVEL. CODE § B.1.b. (1989).

[FN32]. Id.

[FN33]. PLANO, TEX., ZONING ORDINANCE § 3.801 (1998).

[FN34]. Tex. Health & Safety Code Ann. § 752.004 (West 1992).

[FN35]. Tex. Health & Safety Code Ann. § 752.007 (West 1992).

[FN36]. Tex. Health & Safety Code Ann. § 752.008 (Vernon 1992)(emphasis added).

[FN37] Moore v. Southwestern Elec. Power Co., 737 F.2d 496 (5th Cir. 1984), cert. denied, 105 S. Ct. 1181 (1985) (emphasis added).

[FN38]. Olson v. Central Power and Light Co., 803 S.W.2d 808 (Tex. App. 1991).

[FN39]. See Bolton, supra note 1, at 13-14 through 13-16.

[FN40]. Criscuola, 621 N.E.2d 1195.

[FN41]. Ryan v. Kansas Power & Light Co., 815 P.2d 528 (Kan. 1991).

[FN42]. San Diego Gas & Elec. Co. v. Daley, 253 Cal. Rptr. 144 (Cal. Ct. App. 1988)

[FN43]. 920 P.2d 669, 55 Cal. Rptr. 2d 724 (Cal. 1996).

[FN44]. Id. at 754-55.

[FN45]. 80 F.3d 1074 (5th Cir. 1996) (Coker).

[FN46]. Id.

[FN47]. Id. at 1079 (quoting United States v. Robertson, 354 F.2d 877, 881 (5th Cir. 1996)).

[FN48]. 509 U.S. 579 (1993).

[FN49]. Coker, 80 F.3d at 1077.

[FN50]. APPRAISAL STANDARDS BD. OF THE APPRAISAL FOUND., UNIFORM STANDARDS OF PROF'L APPRAISAL PRACTICE 11 (1995).

[FN51]. APPRAISAL INST., THE DICTIONARY OF REAL ESTATE APPRAISAL 171 (3d ed. 1993).

[FN52]. APPRAISAL INST., THE APPRAISAL OF REAL ESTATE 87 (11th ed. 1996).

[FN53] RIGHT OF WAY, various issues, 1993 through 1996.

[FN54]. LCRA Telecommunications Services (last modified Jan. 11, 1999) < http://www.lcra.org/telecom/fiber.html>.

[FN55]. Gomez Leon v. State, 426 S.W.2d 562 (Tex. 1968).

[FN56]. Id. at 565.

[FN57]. Bauer v. Lavaca-Navidad River Auth., 704 S.W.2d 107 (Tex. App. 1985).

[FN58]. Id. at 109

[FN59]. Id.

[FN60] Id. at 111-13.

[FN61]. Id. at 111.

[FN62]. Bauer, 704 S W.2d at 113.

[FN63] Wayne C. Lusvardi, The Flawed Logic of Sales Substitution in the Appraisal of Land Suitable for Habitat Preservation or Mitigation, RIGHT OF WAY, May/June 1997, at 14.

[FN64] Wayne C. Lusvardi, A Critique of the Position Papers on the Valuation of Land Suitable for Habitat Preservation or Mitigation, RIGHT OF WAY, Nov./Dec. 1996, at 23

[FN65]. John P. Dolman & Charles F. Seymour, Valuation of Transportation/Communication Corridors, 46 APPRAISAL J. 515 (1978) (quoting American Right of Way Association, Newsletter, Apr. 1963).

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Tab 11

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Valuation Analysis for Single Family One- to Four- Unit Dwellings

Directive Number: 4150.2

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U.S. Department of Housing and Urban Development

Special Attention of:
Directors, Home Ownership Centers
Directors, Processing and Underwriting
Division, Home Ownership Centers
Direct Endorsement Lenders

Transmittal for Handbook No.: 4150.2, CHG-1

Issued: July 1, 1999

1. This Transmits

Changes to Handbook 4150.2, Valuation Analysis for Single Family One- to Four-Unit Dwellings, dated July 1999

2. Explanation of Changes:

This handbook has been revised to correct several minor errors in this new handbook. Specifically, the word "location" has been changed to "site" on several pages noted below under Filing Instructions. On pages 2-12 and D-25, the size of stationary storage tanks in determining the eligibility of a site has been changed from 100 gallons to 1000 gallons. (The change has also been made to the Notice to Lender, HUD form 92564-VC, referenced in Handbook 4150.2.) The ownership information requirements of the appraisal protocol on page D-1 have been revised to account for refinance transactions. In addition, in Section B-1, the percentage floor area used for commercial purposes follows these standards:

- One story building 25%
- Two story building 49%
- Three story building 33%

This change corrects the reversal of the percentages for two- and three-story buildings.

3. Handbook Cancellations: None

4. Filing Instructions:

Remove:	Insert:
Pages i and ii, dated 5/99	Pages i and ii, dated 6/99
Pages v and vi, dated 5/99	Pages v and vi, dated 6/99
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Pages 4-11 and 4-12, dated 5/99	Pages 4-11 and 4-12, dated

	6/99
Pages 5-1 and 5-2, dated 5/99	Pages 5-1 and 5-2, dated 6/99
Pages 7-3 and 7-4, dated 5/99	Pages 7-3 and 7-4, dated 6/99
Pages 8-1 through 8-3, dated 5/99	Pages B-1 through 8-3, dated 6/99
Page 9-3, dated 5/99	Page 9-3, dated 6/99
Pages A-9 and A-10, dated 5/99	Pages A-9 and A-1 0, dated 6/99
Pages B-1 and B-2, dated 5/99	Pages B-1 and B-2, dated 6/99
Pages D-1 and D-2, dated 5/99	Pages D-1 and D-2, dated 6/99
Pages D-23 through D-26, dated 5/99	Pages D-23 through D-26, dated 6/99
Pages D-33 through D-35, dated 5/99	Pages D-33 through D-35, dated 6/99

Distribution: W-3-1, R-1,R-2,R-3-1(H) (RC),R-3-2,R-3-3,R-6, R-6-2,R-7,R-7-2,R-8,ASC

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U.S. Department of Housing and Urban Development

Special Attention of: TRANSMITTAL Handbook No. 4150.2

Directors, Home Ownership Centers
Directors, Processing and Underwriting Divisions, Home Ownership Centers
Direct Endorsement Lenders

Issued: June 24, 1999

1. This Transmits:
Changes to Handbook 4150.2, Valuation Analysis for Single Family One- to Four- Unit Dwellings, dated July 1999

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None

4. Filing Instructions:

Change "location" to "site" on the following pages:

Page i	Page 5-2
Page v	Page 7-4
Page 2-1	Page 8-2
Page 2-2	Page 8-3

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Valuation Analysis for Single Family One- to Four- Unit Dwellings

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2 SITE ANALYSIS

2-0 INTRODUCTION

This Chapter addresses the site requirements for FHA-insured mortgages. Before the valuation process can begin, subject properties must meet specific site requirements. The appraisal process is the lender's tool for determining if a property meets the minimum requirements and eligibility standards for a FHA-insured mortgage. In addition, these standards provide a context for the appraiser in performing the physical inspection of the property.

2-1 SITE REQUIREMENTS

The purpose of site analysis is to identify the various site characteristics that affect the marketability and the value of the subject property. Site analysis requires the following:

- o determining the desirability and utility of the site
- o determining the degree and extent to which the site, because of external influences, shares in the market for comparable and competitive sites in the community
- o forecasting the likely changes at the site because of justifiable future trends
- o appraising the current situation and knowledge of the various trends that could affect the valuation of the real property

The principal of change is fundamental to appraising real estate and to properly analyzing a site. Value is created and modified by economic, social and governmental changes that occur outside the property. Evaluate the direction of these trends and determine their effect, if any, on the current value of the subject property.

A. NEIGHBORHOOD DEFINITION

The appraiser must clearly define the boundaries - north, south, east and west - of the subject neighborhood. By defining the neighborhood, the appraiser can extract pertinent information on which to base valuation conclusions.

B. COMPETITIVE SITES

Sites are competitive when they are improved with, or appropriate for, residential properties that are similar in accommodations and sales price or rental range for similar residents or prospective occupants. Compare features of the

subject site with the same features of competitive sites within the community. An acceptable site must be related to the needs of the prospective occupants and to the alternatives available to them in other competitive locations.

C. DEFINITIONS - CONSTRUCTION STATUS

Proposed - No concrete or permanent material has been placed. Digging of footing and placement of re-bar is not considered permanent.

Under Construction - From the first placement of concrete (permanent material) to 100% completion. Finalized and ready to occupy.

Existing - 100% complete and has occupancy permit.

(2-1) Existing less than one year - Appraisal performed less than one year since receipt of final occupancy permit issued. For model homes, age begins with issuing of permit to use as a model.

For any home less than 2 years old, list month and year completed in the age box on the URAR.

D. ECONOMIC TRENDS

The appraiser must give consideration to, and include in the value analysis, the economic trends of a neighborhood and the general area, including:

- price and wage levels (the purchasing power of community occupants)
- employment characteristics
- the current supply and demand for residential dwellings, including projects under construction
- taxation levels
- building costs
- population changes
- activity of real estate sales market and mortgage interest rates

E. LAND USE RESTRICTIONS

Site analysis determines the effects of actual and potential neighborhood land use on the subject site. The following factors form patterns for present and future land uses:

1. Zoning

The appraiser should consider the effect on the value of appropriate and well-drawn zoning ordinances. Land-use controls that receive public approval and are strictly enforced protect residential sites from adverse influences that diminish the desirability of sites. This must be noted on the URAR, and its effect must be quantified in the valuation analysis.

2. Protective Easement/Covenants

Properly drawn protective covenants have proven more

effective than zoning regulations in providing protection from adverse environmental influences. When combined with proper zoning ordinances, these covenants provide the maximum legal protection to ensure that a developed residential area will maintain desirable characteristics or that a proposed or partially built-up neighborhood will develop in a desirable manner. Protective easements and covenants should be superior to any mortgage and should be binding to all parties and all persons claiming under them. These must be noted on the URAR and its effect must be quantified in the Valuation Analysis.

3. Inharmonious Land Uses
The appraiser must identify all inharmonious land uses in a neighborhood that affect value. Clearly define the current and long-term effect that inharmonious uses will have on the market value and the economic life of the subject property. If inharmonious land use represents a serious detriment to either the health or safety of the occupants or to the economic security of the property, clearly note safety of the occupants or

to the economic security of the property, clearly note this on the VC and URAR. Recommend that the property be rejected by the Lender.

4. Natural Physical Features
(2-1) The appraiser must consider favorable and underlying topography and site features, including pleasing views, wood lots, broad vistas and climatic advantages. Streets that are laid out with proper regard to drainage, land contours and traffic flow show good design and increase the desirability of the neighborhood. This must be noted on the URAR and its effect must be quantified in the valuation analysis.

5. Attractiveness of Neighborhood Buildings
The overall appeal of a neighborhood is strengthened if the buildings in a neighborhood harmonize with each other and their physical surroundings. A pleasing variety that results in harmoniously blended properties is desirable but not mandatory. The age of the structure is not in itself an important consideration; however, the maintenance of the structure over time has an important impact. Consider the amount of rehabilitation that has taken place or is taking place in a neighborhood. This must be noted on the URAR and its effect must be quantified in the valuation analysis.

6. Neighborhood Character
Mobility and economic growth can alter neighborhood patterns. Shopping, recreation, places of worship, schools and places of employment should be easily accessible. This must be noted on the URAR and its

effect must be quantified in the valuation analysis.

7. Character of Neighborhood Structures
The appraiser must carefully analyze the age, quality, obsolescence and appropriateness of typical properties in a neighborhood. Take into account the attitude of the user group as well as the alternative choices available to the specific market under consideration. This must be noted on the URAR and its effect must be quantified in the valuation analysis.

F. COMMUNITY SERVICES

Community services include commercial, civic and social centers. For a neighborhood to remain stable and retain a high degree of desirability, it should be adequately served by elementary and secondary schools, neighborhood shopping centers, churches, playgrounds, parks, community halls, libraries, hospitals and theaters. A lack of services in the community should be noted and quantified in the valuation analysis. The appraiser must note a change in these services and quantify the effect on value.

G. TRANSPORTATION

Ready access to places of employment, shopping, civic centers, social centers and adjacent neighborhoods is a requisite of neighborhood stability. The appraiser must take into consideration the transportation requirements of the typical family and quantify the effect on value.

H. UTILITIES AND SERVICES

(2-1)
The appraiser must consider these utilities and neighborhood services: police and fire protection, telephone services, electricity, natural gas, garbage disposal, street lighting, water supply, sewage disposal, drainage, street improvements and maintenance. Public services and utilities can affect value and must be quantified. A lack of these services should be noted and quantified in the valuation analysis.

I. NEIGHBORHOOD CHANGE CONSIDERATIONS
As time passes, desirability changes residential areas in any location. Therefore, give special consideration to the following:

- o infiltration of commercial, industrial or nonconforming use
- o positive and negative effect on value of gentrification
- o changes in the mobility of people (employment shifts)
- o weakly enforced zoning regulation or covenants

J. MARKETABILITY
The demand for home ownership in a neighborhood is directly related to the marketability of the homes in the neighborhood or in competitive neighborhoods. Home ownership rates, vacancies and the marketing time of dwellings in a neighborhood help the appraiser determine the

strength of market demand and the extent of supply.

K. SMALL COMMUNITY MARKET PREFERENCES
A small town may have its own set of standards in architectural design, livability, style of mechanical equipment, lot size, placement of structures, nature of street improvements and in all features of the physical property and environment. Judge each in light of local standards and preferences.

L. OUTLYING SITES AND ISOLATED SITES
The segment of the market interested in purchasing homes in these sites compares the advantages and disadvantages of other outlying or isolated locations.

M. STUDY OF FUTURE UTILITY
The study of future utility is typically covered in the appraiser's Highest and Best Use Analysis and includes:

- o selecting possible uses
- o rejecting uses that are obviously lower or higher than the most probable use
- o analyzing differing motives of those buyers

The study of the future uses and utility of a particular property win lead the appraiser to the property's Highest and Best Use.

N. CONSIDERATION OF GENERAL TAXES AND SPECIAL ASSESSMENTS
When estimating value, account for general taxes and special assessments:

- o General real estate taxes related to specific sites are a recurring periodic expense in the ownership of taxable real property and must be accounted for in the value estimate.

- o Special assessments of various types are frequently an additional expense of

(2-1) ownership

and must similarly be accounted for in the value estimate.

Determine the relative effect of the real estate tax and/or special assessment's burden on the desirability of the site. Enter this information on the URAR.

1. Assessment
The real estate tax liability is computed by multiplying the assessed value by the tax/ millage rate, which is typically expressed in dollars per hundred or dollars per thousand of assessed value. In the addendum to the VC, state the assessment, real estate tax liability and tax year. State the assessed market value of the subject property in the addenda.

> If there is no method to relate the assessment to

market value, such as new construction where reasonable assessment may not exist, mark the assessed market value response as "N/ A".

2. Special Assessment
A special assessment can be calculated in two ways:

- o the same way as real estate taxes, or
- o on a pro-rated basis

Determine how the special assessment is calculated and report the special assessment liability on the URAR.

> If the property does not have special assessment, mark the URAR "N/A".

For example: An organization that services a community creates an annual operating budget. Each property becomes liable for its percentage of that budget based on the percentage of front feet their property has compared to the total amount of front feet as a special assessment in this community.

2-2 SPECIAL NEIGHBORHOOD HAZARDS AND NUISANCES
Physical conditions in some neighborhoods are hazardous to the personal health and safety of residents and may endanger physical improvements. These conditions include unusual topography, subsidence, flood zones, unstable soils, traffic hazards and various types of grossly offensive nuisances.

When reporting the appraisal, consider site hazards and nuisances.

> If site hazards exist and cannot be corrected but do not meet the level of unacceptability, the appraisal must be based upon the current state.

> If the hazard and/or nuisance endangers the health and safety of the occupants or the marketability of the property, mark "YES" in VC-1 and return the unfinished appraisal to the lender.

(2-2) The lender, who is ultimately responsible for rejecting the site, relies on the appraiser's site analysis to make this determination. Guidelines for determining site acceptability follow. The appraiser is required to note only those readily observable conditions.

A. UNACCEPTABLE SITES
FHA guidelines require that a site be rejected if the property being appraised is subject to hazards, environmental contaminants, noxious odors, offensive sights or excessive noises to the point of endangering the physical improvements or affecting the livability of the property, its marketability or the health and safety of its occupants. Rejection may also be appropriate if the future economic

life of the property is shortened by obvious and compelling pressure to a higher use, making a long-term mortgage impractical.

These considerations for rejection apply on a case-by-case basis, taking into account the needs and desires of the purchaser. For example, a site should not be considered unacceptable simply because it abuts a commercial use; some commercial uses may not appeal to a specific market segment while other commercial uses may.

If the condition is clearly a health and safety violation, reject the appraisal and return it to the lender. If there is any doubt as to the severity, report the condition and submit the completed report. The lender must clear the condition and may require an inspection or reject the property. For those conditions that cannot be repaired, such as site factors, the appraised value is based upon the existing conditions.

B. TOPOGRAPHY

There are special hazards caused by unique topography. For example, denuded slopes, soil erosion and landslides often adversely affect the marketability of hillside areas. When evaluating the site, consider earth and mud slides from adjoining properties, falling rocks and avalanches. These occurrences are associated with steep grades and must be considered in the site analysis.

C. SUBSIDENCE

Danger of subsidence is a special hazard that may be encountered under a variety of circumstances:

- where buildings are constructed on uncontrolled fill or unsuitable soil containing foreign matter such as organic material
- where the subsoil is unstable and subject to slippage or expansion

In mining areas, consider the depth or extent of mining operations and the site of operating or abandoned shafts or tunnels to determine if the danger is imminent, probable or negligible.

The appraiser must note any readily observable conditions, which indicate potential problems. Signs include fissure or cracks in the terrain, damaged foundations, sinkholes or settlement problems.

If there is a danger of subsidence, the specific site will be deemed ineligible unless complete and satisfactory evidence can be secured to establish that the probability of any threat is negligible.

> If there is evidence of subsidence, the property is ineligible. Mark the "YES" column in VC-1 under

subsidence.

D. OPERATING AND ABANDONED OIL OR GAS WELLS

Operating and abandoned oil and gas wells pose potential hazards to housing, including potential fire, explosion, spray and other pollution.

1. Existing Construction

No existing dwelling may be located closer than 300 feet from an active or planned drilling site. Note that this applies to the site boundary, not to the actual well site.

2. New or Proposed Construction

If an operating well is located in a single-family subdivision, no new or proposed construction may be built within 75 feet of the operating well unless mitigation measures are taken. This measure is designed to:

- o avoid nuisance during maintenance
- o diminish noise levels caused by pumping
- o reduce the likelihood of contamination by potential spills

The appraiser must examine the site for the existence of or any readily observable evidence of a well.

3. Abandoned Well

A letter may be obtained from the responsible authority in the state government stating that the subject well was safely and permanently abandoned.

- o When such a letter is provided, a dwelling may be located no closer than 10 feet from the abandoned well.
- o When a letter is not provided, the dwelling must be located at least 300 feet from the abandoned well.

The lender is responsible for obtaining the letter; the appraiser must note the location of the well and verify the existence of the letter.

4. Special Case - Proposed, Existing or Abandoned Wells

(2-2) Hydrogen sulfide gas emitted from petroleum product wells is toxic and extremely hazardous. Minimum clearance from sour gas wells may be established only after a petroleum engineer has assessed the risk and state authorities have concurred on clearance recommendations for petroleum industry regulation and for public health and safety.

> If there is readily observable evidence that the conditions exist, mark the "YES" column in VC-1 under operating and abandoned wells.

> If an inspection by a qualified person verifies that the condition exists and is acceptable based on the standards defined above, account for the presence of wells in the valuation of the property.

E. SLUSH PITS

A slush pit is a basin in which drilling "mud" is mixed and circulated during drilling to lubricate and cool the drill bit and to flush away rock cuttings. Drilling mud normally contains large quantities of bentonite - a very expansive soil material. This results in a site with the potential for great soil volume change and, therefore, damage to structures.

To be eligible for FHA mortgage insurance, all unstable and toxic materials must be removed and the pit must be filled with compacted selected materials.

> If a property is proposed near an active or abandoned well, call for a survey to locate the pits and their impact on the subject property.

> If there is any readily observable evidence of slush pits, mark the "YES" column in VC-1.

F. HEAVY TRAFFIC

Close proximity to heavily traveled roadways can have a negative effect on the marketability and value of sites because of excess noise and danger. Properties backing to freeways or other thoroughfares that are heavily screened or where traffic is well below grade and at a sufficient distance from the property may not affect value. For detailed noise acceptance levels, reference 24 CFR 51.103.

> If there is significant noise or unsafe traffic conditions that endanger the occupants or affect the marketability of the property, mark "YES" in VC-1.

Typically, traffic hazards cannot be corrected. Therefore, the appraiser must quantify the effect on value if the property is marketable. This adjustment should be supported by comparable transactions. This condition could be the reason that a lender ultimately rejects the property. Do not reject existing properties only because of heavy traffic if there is evidence of acceptance within the market and if use of the dwelling is expected to continue.

G. AIRPORT NOISE AND HAZARDS

(2-2) Sites near, an airport may be subjected to the noise and hazards of low-flying aircraft. Appraisers must identify affected properties, review airport contour maps

and condition the appraisal accordingly.

Do not reject existing properties only because of airport influences if there is evidence of acceptance within the market and if use of the dwelling is expected to continue. HUD's position is that because the properties are in use and are expected to be in use into the near future, their marketability should be the strongest indicator of their acceptability. Marketability should account for the following considerations:

- plans for future expansion of airport facilities
- prospective increases in the number of planes or flights using the field or specific runways
- the timing and frequency of the volume of flights
- any other factors that may increase the annoyance of having the airport nearby excessive noise

If changes are likely, the appraiser must anticipate any adverse effect that these changes are likely to have on the marketability of the property. The appraiser should judge each situation on its merits. Compare the effect of aircraft activity on the desirability of a particular site with other sites that are:

- improved with similar structures
- considered competitive with those located in the subject neighborhood

H. SPECIAL AIRPORT HAZARDS

HUD requires that the buyer of a property located in a Runway Clear Zone/Clear Zone is advised that the property is located in such a zone and of the implications associated with that site. This includes the possibility that the airport operator could acquire the property in the future.

1. New and Proposed Construction

New and proposed construction within Runway Clear Zones (also known as Runway Protection Zones) at civil airports or within Clear Zones at military airfields are ineligible for home mortgage insurance.

Properties located in Accident Potential Zone I at military airfields may be eligible for FHA insurance provided that the property is compatible with Department of Defense guidelines. For more information, see 24 CFR 51.303(b).

If new or proposed construction lies within these zones, mark "YES" in VC-1.

2. Existing Construction

Existing dwellings more than one year old are eligible for FHA mortgage insurance if the prospective purchaser acknowledges awareness that the property is located in a Runway Clear Zone/Clear Zone. The lender will furnish this disclosure form to the

buyer. For a sample of the buyer's acknowledgment certification, see HUD Handbook 4150.1, REV-1, Chapters 4-26 (a) and (b).

(2-2)

> Note whether the property is in a Clear Zone and condition the appraisal on the buyer's acknowledgment.

I. PROXIMITY TO HIGH PRESSURE GAS

A dwelling or related property improvement near high-pressure gas, liquid petroleum pipelines or other volatile and explosive products - both above ground and subsurface must be located outside of the outer boundary of the pipeline easement.

> If the property is less than ten feet away, mark "YES" in VC-1.

J. OVERHEAD HIGH-VOLTAGE TRANSMISSION LINES

No dwelling or related property improvement may be located within the engineering (designed) fall distance of any pole, tower or support structure of a high-voltage transmission line, radio/TV transmission tower, microwave relay dish or tower or satellite dish (radio, TV cable, etc.). For field analysis, the appraiser may use tower height as the fall distance.

For the purpose of this Handbook, a High-Voltage Electric Transmission Line is a power line that carries high voltage between a generating plant and a substation. These lines are usually 60 Kilovolts (kV) and greater, and are considered hazardous. Lines with capacity of 12-60 kV and above are considered high voltage for the purpose of this Handbook. High voltage lines do not include local distribution and service lines.

Low voltage power lines are distribution lines that commonly supply power to housing developments and similar facilities. These lines are usually 12 kV or less and are considered to be a minimum hazard. These lines may not pass directly over any structure, including pools, on the property being insured by HUD.

> If the property is within the unacceptable distance, mark "YES" in VC-1.

K. SMOKE, FUMES, OFFENSIVE NOISES AND ODORS

Excessive smoke, fog, chemical fumes, noxious odors, stagnant ponds or marshes, poor surface drainage and excessive dampness are hazardous to the health of neighborhood occupants and adversely affect the market value of the subject property.

> If these conditions threaten the health and safety of the occupants or the marketability of the property, mark "YES" in VC-1. If, however, the extent of the hazard is not dangerous, account for its effect in the valuation of the property.

> Include other factors that may affect valuation such as offensive odors and unsightly neighborhood features such as stables or kennels.

L. FLOOD HAZARD AREAS

Designation of Special Flood Hazard Areas

(2-2) The Federal Emergency Management Agency (FEMA) determines Special Flood Hazard Areas nationwide, (SFHA). FEMA issues Flood Hazard Boundary Maps to designate these areas in a community. A special flood hazard may be designated as Zone A, AO, AH, A1-30, AE, A99, VO or V1-30, VE or V.

- Only those properties within zones 'A' and 'V' require flood insurance.
- Zones 'B' or 'C' do not require flood insurance because FEMA designates only zones 'A' and 'V as "Special Flood Hazard Areas."

An appraisal report with a positive indication in a Special Flood Hazard Area (SFHA) activates a commitment requirement for flood insurance coverage. The appraiser must quantify the effect on value, if any, for properties within a designated flood map.

A lender shall reject a property in any of these circumstances:

- if the property is subject to frequently recurring flooding
- if there is any potential hazard to life or safety
- if escape to higher ground would not be feasible during severe flooding conditions

FEMA Maps

For copies of FEMA's Flood Hazard Boundary Maps and Flood Insurance Rate Maps, contact:

Federal Emergency Management Agency (FEMA)
FEMA Map Service Center
P.O. Box 1038
Jessup, MD 20794-1038
Phone: 1-800-358-9616
Fax: 1-800-358-9620

Eligibility of Properties for FHA Insurance

The lender is responsible for determining the eligibility of properties in Flood Zones, and relies on the appraiser's notation on the URAR.

1. New and Proposed Construction

If any part of the property improvements essential to the property value and subject to flood damage are located within the 100-year floodplain, then the entire property, improved and otherwise, is ineligible for FHA mortgage insurance unless a Letter of Map Amendment

(LOMA) or a Letter of Map Revision (LOMR) is submitted with the case for endorsement. Proposed construction where improvements are located, or to be located, within a designated Special Flood Hazard Area (SFHA) is ineligible for FHA insurance. This is true regardless of whether the property is covered or will be covered by flood insurance unless the lender can furnish evidence of a LOMA, a LOMR or evidence that the property is not in a SFHA.

(2-2) For existing properties located in a SFHA, make the appropriate notation in the URAR.

> If the proposed improvements are located in a SFHA and there is no LOMA or LOMR mark "YES" in VC-1 and return the unfinished appraisal to the lender until these documents are retrieved.

2. Existing Construction
Market attitude and acceptance determine the eligibility of existing properties located in a designated SFHA. Flood insurance is required for properties accepted for mortgage insurance in a FEMA-designated SFHA.

3. Condominium
The Homeowners Association is responsible for maintaining flood insurance on the project as a whole, not each individual unit. The appraiser must verify the location of a condominium in the floodplain and make the correct notation in the URAR.

M. STATIONARY STORAGE TANKS

Stationary Storage tanks containing flammable or explosive material pose potential hazards to housing, including hazards from fire and explosions.

> If the property is within 300 feet of a stationary, storage tank containing more than 1000 gallons of flammable or explosive material, the site is ineligible. Mark "YES" in VC-1 and return the unfinished appraisal to the lender.

Tab 12

PART 240. MOBILE AND LAND-BASED TELECOMMUNICATIONS FACILITIES*

* Editor's note--Part 240, sections 32-240.01 through 32-240.19, was adopted by the board of supervisors on July 7, 1998, pursuant to Ordinance 98-62.

Sec. 32-240.01. Purpose and Intent.

This article, as adopted and amended, is for the general purpose of establishing parameters for the siting of mobile and land-based telecommunications facilities, including monopoles, towers, antennas, and related equipment. The intent of this ordinance is as follows:

(1) encourage the location of monopoles and towers in nonresidential areas;

(2) minimize the total number of monopoles and towers throughout the county;

(3) encourage the use of public properties for new monopole towers, antennas, and related equipment;

(4) strongly encourage the joint use of new and existing monopole and tower sites;

(5) encourage users of monopoles and towers to locate them, to the extent possible, in areas where the adverse impact on the community is minimal;

(6) encourage users of monopoles and towers to configure them in a way that minimizes the adverse visual impacts through careful design and siting;

(7) ensure public health, safety, welfare, and convenience; and

(8) conform with federal and state laws that allow certain antennas to be exempt from local regulations. (No. 98-62, 7-7-98)

Sec. 32-240.02. Applicability.

(1) The requirements set forth in this part shall govern the location of monopoles and towers that are fifty (50) feet in height or greater, and performance standards for antennas and related equipment used in association with existing structures, roof tops, utility distribution structures, and replacement utility distribution structures that are designed to accommodate antennas and associated equipment. Monopoles and towers that are less than fifty (50) feet in height shall be permitted by right in all zoning districts, subject to the provisions of sections 32-300.02, *et seq.* and 32-400.02, *et seq.*

(2) Antennas and related unmanned equipment buildings not located on buildings and structures shall be subject to sections 32-300.03 and 32-400.02.

(3) Other than the provisions of sections 32-240.10(2) through (4) and (11), the requirements set forth in this part do not govern the use and location of towers used solely for amateur service that are seventy-five (75) feet or less in height. (No. 98-62, 7-7-98)

Sec. 32-240.03. Removal of Telecommunications Facilities.

All unused equipment and facilities at a telecommunications facility shall be removed within twelve (12) months of cessation of use, or the expiration of the land lease, whichever occurs first, and the site shall be restored as closely as possible to the condition before the facilities were constructed. (No. 98-62, 7-7-98)

Sec. 32-240.10. General Performance Standards.

(1) Mobile and land-based telecommunications facilities shall be permitted in any zoning district, or within any public right-of-way when such use is in accordance with the provisions of this part. In addition, such uses shall be subject to the requirements of § 15.2-2232, Va. Code Ann.

(2) Signals, lights, or illumination shall be permitted as required by the Federal Communications Commission, Federal Aviation Administration, or other federal authorities, state authorities, or the county. If given the option by the Federal Communications Commission and/or Federal Aviation Administration red incandescent lights shall be used at night in lieu of

white lights. Nonfunctional signals, lights, or illumination shall be repaired within twenty-four (24) hours.

(3) Telecommunications facilities used for mobile and land-based telecommunications shall not display any commercial advertising.

(4) Telecommunications facilities shall not interfere with or obstruct any county two-way radio or point to point microwave communications system.

(5) Monopoles and towers shall be set back as follows:

(a) two (2) feet for every foot in height of the monopole or tower from a dwelling on another parcel;

(b) two hundred (200) feet from a public street, except a one-to-one setback shall be allowed along Prince William Parkway for any monopole or tower within a lot that abuts the right-of-way;

(c) any other yard and setback requirements of the district.

(6) Monopoles and towers shall be installed in conformance with ANSI/EIA/TIA-222, Structural Standards for Steel Antenna Towers and Antenna Supporting Structures, as amended or superseded.

(7) The base of monopoles and towers, including anchors, and any accessory facility or building shall be screened from public streets and from adjoining development in accordance with buffer type A of the Design and Construction Standards Manual.

(8) Unmanned equipment buildings used in association with monopoles, towers, and antennas shall meet the yard and setback requirements of the zoning district in which they are located, unless otherwise specified herein.

(9) Each unmanned equipment building located on the ground shall neither contain more than three hundred and sixty (360) square feet of gross floor area per user nor be more than twelve (12) feet in height.

(10) Prior to issuance of building permits for a monopole or tower, the applicant shall verify that the applicable regulations of the Federal Communications Commission (FCC) and Federal Aviation Administration (FAA) have been met and a finding from the FAA that the proposed facility is not a hazard or obstruction to aviation.

(11) Monopoles and towers must be designed to collapse within the lot lines of the property upon which they are constructed.

(12) Yard and setback exemptions contained in section 32-201.19 shall not apply to this part.

(13) Height and setback restrictions contained in section 32-400.03(5) shall not apply to this part. (No. 98-62, 7-7-98)

Sec. 32-240.11. Antennas Mounted on Existing Structures and Rooftops.

(1) Antennas and related unmanned equipment are permitted in all zoning districts on buildings and structures in accordance with this part.

(2) Antennas and related unmanned equipment may exceed the maximum building height limitations, provided the antenna and related unmanned equipment is in accordance with the performance standards of this part.

(3) Each antenna mounted on existing structures and rooftops with any related unmanned equipment may be developed subject to the following performance standards:

(a) Omnidirectional or whip antennas shall not exceed twenty (20) feet in height and not exceed seven (7) inches in diameter and shall be of an industry standard material and color which is identical to, or closely compatible with the color of the supporting structure so as to make the antenna and related equipment as visually unobtrusive as possible.

(b) Directional or panel antennas shall not exceed ten (10) feet in height and not exceed two (2) feet in width and shall be of an industry standard material and color which is identical to, or closely compatible with the color of the supporting structure so as to make the antenna and related equipment as visually unobtrusive as possible.

(c) Cylinder-type antennas shall not exceed six (6) feet in height and not exceed twelve (12) inches in diameter.

(d) Satellite and microwave dishes shall not exceed ten (10) feet in diameter and such facilities greater than three (3) feet in diameter shall be screened with an appropriate architectural treatment that is compatible with or integral to the architecture of the building to which they are attached. (No. 98-62, 7-7-98)

Sec. 32-240.12. Antennas Mounted on Existing or Replacement Utility Distribution Structures and Other Structures.

Antennas mounted on existing and replacement utility distribution structures, light poles, overhead highway signs, and camera standards, with related unmanned equipment buildings, shall be permitted in all zoning districts, except as provisioned in subsection (5) below. Such antennas may exceed building height limitations, and shall be subject to the following performance standards.

(1) Omnidirectional or whip antennas shall neither exceed twenty (20) feet in height nor seven (7) inches in diameter.

(2) Directional or panel antennas shall neither exceed ten (10) feet in height nor two (2) feet in width.

(3) Cylinder-type antennas shall neither exceed six (6) feet in height nor twelve (12) inches in diameter.

(4) Satellite and microwave dish antennas shall not be permitted.

(5) Antennas in agricultural and residential districts shall be subject to the following performance standards:

(a) Omnidirectional or whip antennas shall neither exceed twelve (12) feet in height nor two (2) inches in diameter.

(b) Directional or panel antennas shall neither exceed nine (9) feet in height nor two (2) feet in width.

(c) An equipment building or enclosure, when mounted on a pole or standard, shall not exceed four (4) cubic feet.

(d) No more than nine (9) whip/omnidirectional antennas shall be mounted on a pole or standard.

(6) Any other such antennas shall not exceed standards as set forth in subsections (1) through (5) above.

(7) Unmanned-equipment buildings in agricultural and residential districts shall be located a minimum of fifteen (15) feet from all lot lines when located outside the street right-of-way.

(8) A replacement pole or standard in an agricultural or residential district, may exceed the height and diameter of the existing pole or standard by not more than twenty-five (25) percent with a maximum finished height of eighty (80) feet, including the antennas, except that if the existing pole or standard exceeds eighty (80) feet and is located in a utility easement, the finished height, including antennas, of the replacement pole or standard shall be no more than fifteen (15) feet higher.

(9) A replacement pole or standard in a commercial or industrial district may exceed the height or diameter of the existing pole or standard by not more than twenty-five (25) percent with a maximum finished height of one hundred (100) feet, including the antennas. If the existing pole or standard exceeds one hundred (100) feet in height, the height, including the antennas, of the replacement pole or standard shall be no more than fifteen (15) feet higher.

(10) A replacement pole or standard in an interstate highway right-of-way may exceed the height or diameter of the existing pole or standard by twenty-five (25) percent with a maximum finished height of one hundred (100) feet. If the existing pole or standard exceeds one hundred (100) feet in height, the height, including the antennas, of the replacement pole or standard shall be no more than fifteen (15) feet higher.

(11) Replacement or new cross bars may be permitted on poles and standards, provided that the cross bar is the same color as that of the existing pole or standard, and the width of the cross bar does not exceed fifteen (15) feet. (No. 98-62, 7-7-98)

Sec. 32-240.13. Monopoles, General Performance Standards.

Monopoles with a related unmanned equipment building shall be subject to the following general performance standards:

(1) The height of the monopoles, including the antennas, shall not be more than one hundred and ninety-nine (199) feet, as measured from the ground elevation at the base of the structure.

(2) The monopole shall be designed to accommodate at least three (3) telecommunications providers.

(3) Satellite and microwave dishes attached to a monopole shall not exceed six (6) feet in diameter.

(4) Unless otherwise required by the Federal Communications Commission or the Federal Aviation Administration, monopoles shall have a galvanized silver or gray finish. (No. 98-62, 7-7-98)

Sec. 32-240.14. Monopoles, Permitted by Right.

(1) Monopoles not exceeding one hundred and ninety-nine (199) feet in height, including the antennas and related unmanned equipment buildings shall be permitted by right, subject to a public facilities determination by the planning director, in nonresidential districts in accordance with the general performance standards of sections 32-240.10 and 32-240.13.

(2) Monopoles shall be permitted within utility easements, subject to the following:

(a) A public facility determination shall be required.

(b) The utility easement shall be a minimum of one hundred (100) feet in width.

(c) The easement shall contain overhead utility distribution structures that are eighty (80) feet and greater in height.

(d) The easement shall be located within property owned, controlled, or leased by a governmental agency.

(e) The height of the monopole located within a utility easement containing overhead utility distribution structures, as approved by the State Corporation Commission pursuant to § 56-46.1 of the Code of Virginia, as amended, may exceed one hundred and ninety-nine (199) feet provided the height of the monopole does not exceed the height of the utility distribution structures by more than thirty (30) feet in any circumstance. Monopoles and equipment buildings located within a utility easement shall be set back a minimum of thirty-five (35) feet from all utility easement lines.

(f) The performance standards of sections 32-240.10 and 32-240.13(2), (3) and (4) shall be met. (No. 98-62, 7-7-98)

Sec. 32-240.15. Monopoles, Permitted With a Special Use Permit.

Monopoles that are fifty (50) feet or greater in height, including the antennas, and not meeting one or more of the performance standards of sections 32-240.10, 32-240.13 and 32-240.14 shall be permitted with a special use permit.

Minimum lot size in A and R districts shall be one (1) acre. (No. 98-62, 7-7-98)

Sec. 32-240.16. Telecommunications Facilities, Towers, General Performance Standards.

Towers with a related unmanned equipment building, where permitted by right or with a special use permit, shall be subject to the following general performance standards:

(1) The tower shall be designed to accommodate at least four (4) telecommunications providers.

(2) Satellite and microwave dishes attached to a tower shall not exceed ten (10) feet in diameter.

(3) Unless otherwise required by the Federal Communications Commission, the Federal Aviation Administration, towers shall have a galvanized silver or gray finish. (No. 98-62, 7-7-98)

Sec. 32-240.17. Telecommunications Facilities, Towers, Permitted by Right.

Towers not exceeding one hundred and ninety-nine (199) feet in height, including the antennas, shall be permitted in all nonresidential districts, subject to a public facility determination by the director of planning, in accordance with the general performance standards of sections 32-240.10 and sections 32-240.16. (No. 98-62, 7-7-98)

Sec. 32-240.18. Telecommunications Facilities, Towers, Permitted With a Special Use Permit.

Towers that are fifty (50) feet or greater in height, including the antennas, and not meeting one or more of the performance standards of sections 32-240.10, 32-240.16 and 32-240.17 shall be permitted with a special use permit.

Minimum lot size in A and R districts shall be one (1) acre. (No. 98-62, 7-7-98)

Sec. 32-240.19. Application and Submission Requirements for Telecommunications Monopoles, Towers and Ancillary Buildings and Facilities.

All monopole and tower applications shall include the following requirements. Applications for special use permits shall also conform to the general application and submission requirements contained in sections 32-700.50, *et seq.*

(a) Address, site geographic parcel identification number (GPIN), geographic coordinates (latitude and longitude), datum reference, and site ground elevation above mean sea level.

(b) Written description and scaled drawings of the proposed antenna support structure, including structure height, ground and structure design, and proposed materials.

(c) Number and type of antennas and their height above ground level, including the proposed placement of antennas on the support structure.

(d) A statement that there will be no conflict with other licensed telecommunications facilities.

(e) Details of the facility design capacity for additional antennas and other associated equipment.

(f) An inventory of other telecommunications facilities in the county owned by the applicant.

(g) Propagation maps and a statement of the technical and operational requirements for the proposed facility, the service area to be covered, evaluation of the existing telecommunications facilities, water tanks, utility distribution structures, and tall buildings within one (1) mile of the proposed facility in the urban employment, and suburban areas identified in the comprehensive plan and within two (2) miles of the proposed facility in the rural areas.

(h) When locating within a residential area, a written technical and operational analysis of why a monopole or similar structure at a height less than one hundred (100) feet cannot be used.

(i) Line-of-sight diagram or photo montage, showing the proposed monopole or tower set against the skyline and viewed in at least four (4) directions within the surrounding areas.

(j) A statement clearly justifying why collocation of proposed facilities with existing facilities or other structures is not feasible.

(k) A statement that the proposed monopole will be able to accommodate at least three (3) providers of telecommunications services and the proposed tower will be able to accommodate at least four (4) providers of telecommunications services.

(l) A statement that other providers will be allowed to use the monopole or tower at fair market value such that all of the excess capacity of the facility is used.

(m) A color-drawing or sample of the materials to be used on the monopole, towers, antennas, and unmanned equipment buildings.

(n) If the telecommunications facility is to be located in an area which is not designated as the highest priority/order of preference, pursuant to Tele-Policy 2 of the Telecommunications Chapter of the comprehensive plan, the applicant shall provide a justification statement supporting their choice of location. (No. 98-62, 7-7-98)

Tab 13

UTAH RULES OF CIVIL PROCEDURE

Rule 56. Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

UTAH RULES OF EVIDENCE

Rule 401. Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

Rule 408. Compromise and offers to compromise.

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.
(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rules 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of Paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.
(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.
(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.
(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a

matter of which a record, report, statement, or data compilation in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organization. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.
(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.
(23) Judgment as to personal, family or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.
(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 804. Hearsay exceptions; declarant unavailable.

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:
(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
(3) testifies to a lack of memory of the subject matter of the declarant's statement; or
(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.
A declarant is not unavailable as a witness if the exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.
(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the

same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a civil or criminal action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, if the judge finds it was made in good faith.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.